United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

275

No. 19,247

PAUL BELTON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court

for the District of Columbia

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(Appointed by this Court)

QUESTIONS PRESENTED

I. Was there sufficient evidence of the essential elements of premeditation and deliberation to justify the trial court's submission of the case to the jury on a charge of first degree murder?

II. Did the trial court instruct the jury accurately and adequately on the essential elements of premeditation and deliberation?

III. Did the trial court err in refusing to submit to the jury the charge of manslaughter as a lesser included offense?

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CASES:

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia on a two-count indictment charging him with murder in the first degree in violation of 22 D.C. Code § 2401 and possession of a prohibited weapon in violation of 22 D.C. Code § 3214(b). On January 14, 1965, appellant was found guilty as charged by a jury. On February 19, 1965, he was sentenced to life imprisonment on the first count, with the provision that he should not be eligible for parole for at least 20 years, and to a term of one to three years on count two, the sentences to run concurrently.

On March 2, 1965 the District Court authorized appellant to proceed on appeal without prepayment of costs. On December 14, 1965 this Court ordered preparation of a transcript of the trial proceedings at the expense of the United States. Present counsel were appointed by this Court on December 14, 1965, and March 9, 1966, respectively. The record was docketed on March 15, 1966.

The jurisdiction of the Court on Appeal is founded on the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Summary of Proceedings

Appellant was indicted on January 20, 1964. The first count of the indictment alleged that on or about November 30, 1963 he murdered Margaret Thomas "purposely with deliberate and premeditated malice," by shooting her with a pistol, in violation of 22 D.C. Code § 2401. The second count alleged possession of a pistol with intent to use it unlawfully, in violation of 22 D.C. Code § 3214(b).

Defendant pleaded not guilty on January 24, 1964. He was committed to St. Elizabeth's Hospital for mental examination on April 1, 1964 pursuant to 24 D.C. Code § 301. Appellant was found competent to stand trial on January 12, 1965 and his trial commenced that day before Keech, J., and a jury. He was found guilty as charged on both counts, the jury returning a recommendation of life imprisonment on count one. Appellant was sentenced to life imprisonment on count one, with the provision that he should not be eligible for parole for at least twenty years. He was sentenced to a

term of one to three years on count two, this sentence to run concurrently with the sentence on count one.[1/]

B. Appellant's Trial

1. The Government's Case-in-Chief

Yvonne Thomas, 18, the daughter of the decedent Margaret Thomas, testified that appellant had lived for several years with Margaret Thomas and herself. The family was residing at 1814 Florida Avenue, N. W., on November 30, 1963, the night of the alleged crime. (Tr. 29) That night her mother, herself, and three other persons, Harris, Sheffield, and Blocker were watching television in the bedroom. Her mother was lying across the bed. (Tr. 30-31)

She testified that appellant came in the back door and went toward the bed. He and Margaret Thomas exchanged words. Appellant said, "I thought you didn't drink any more" and Margaret Thomas "looked at him and told him--and asked him, was he crazy." (Tr. 32).

1/ The sentence on count two was imposed on the basis of an information filed by the United States Attorney stating that appellant had a prior felony conviction.

Yvonne Thomas further testified:

> "So he pulled the gun out of his pocket and started shooting it, and then we grabbed out coats and ran out the door and then we came back, and as we started out--he had shot the gun and then he shot about six times." (Tr. 32)

The witness testified that after she ran out, she came back to the door and looked in. Her mother was lying on her back "and blood was coming from her face, and he had a rag in his hand wiping it off. He told me come see about my mother, and I told him no, and then I ran over to the phone booth, I called the ambulance . . . ." (Tr. 32)

The witness further testified that she had been in the house all day on November 30 and that appellant had not been at the house at all that day. (Tr. 34) She did not hear any other conversation between appellant and her mother on the day of the shooting except that:

> "I know he called and all I could hear that--some (sic) he was saying about some man came on the job to pick her up, or something like that, but I didn't pay any--too much attention to it." (Tr. 36)

On cross examination the witness testified that her mother had been drinking on the night of the killing. (Tr. 41) She also testified that she had seen appellant with

the pistol before and that appellant had it "around the house long before" that night. (Tr. 42)

The Government's next witness, Eric Harris, a 16 year-old junior high school student, testified that he was in the apartment watching television that night. (Tr. 47) He testified that appellant came in after 8 o'clock and:

> "so after he came in he had a gun with him; and so he was--he says something to Miss Thomas; and so then he started shooting at her, and so then she looked up at him, asked him was he crazy, then laid back down. So he shot six times; so then he started reloading the gun and so then after that we picked up our coats and we left." (Tr. 49)

On cross examination the following colloquy occurred:

> "Q. Well, when he came in, do I understand he immediately started shooting?
>
> A. No sir; he said something first, then start shooting.
>
> Q. What did he say?
>
> A. I couldn't understand what he said." (Tr. 51)

Courtney Booker, an elderly upstairs neighbor, testified that she had a conversation with appellant that night in her apartment and that appellant said to her

"that Margaret was gone. I said, 'Gone where? Is she dead?' And he told me, yes, that she was." (Tr. 61)

This witness at first testified that appellant did not say whether or not he had anything to do with Margaret Thomas' death. The Government thereupon claimed surprise. (Tr. 62) Upon further questioning, the witness testified that appellant had said "I killed her." (Tr. 65)

On cross examination she said that when she asked appellant "What did you do that for?", appellant "said he didn't know, or something of the kind, like that . . . . He didn't give me no reason whatsoever." (Tr. 66-67)

She testified that she had heard arguments between the decedent and appellant "Just now and again, but it wasn't nothing." (Tr. 65) She said she did not hear any argument between them that day. (Tr. 66)

Private Holmes E. Husk, of the Metropolitan Police Department, testified that he entered the premises and found the decedent lying across the bed. He observed two bullet holes in her head. (Tr. 72-73) Appellant was there at the time with several other people. He searched appellant and

found nothing. (Tr. 74) He observed what he believed to be a bullet hole in the wall and found two empty 22 caliber cartridges on the floor alongside the bed. (Tr. 74-75)

Kimmie Booker, daughter of Courtney Booker, testified that on the day after Margaret Thomas' death, she was washing some clothes in her bathroom. She had put the clothes in a basket the preceding night. When she looked through the clothes in the basket on Sunday, she found some bullets. She called the police to come and get them. (Tr. 80-81)

She testified on cross examination that appellant had gone hunting on Thanksgiving Day and had taken a gun with him to go hunting. (Tr. 83)

Det. Sgt. Jack L. Buch of the Homicide Squad testified that he investigated the death of Margaret Thomas. He observed two wounds in her body and found three holes in the bed. He recovered two slugs from beneath the bed, four 22 caliber expended shell casings from the foot of the bed, and a live 22 caliber shell alongside the bed. (Tr. 85)

He testified that he did not find a weapon on the night of November 30. (Tr. 86) He said that the next day, in response to a telephone call from Mrs. Kimmie Booker, he

went to the Booker apartment and found a 22 caliber revolver in the wash basket. He also found 54 shells of the same caliber. (Tr. 86-87) Det. Buch turned the revolver and the ballistics exhibits found in the apartment over to the F.B.I. laboratory, along with two slugs he had received from the Deputy Coroner. He also testified that he recovered a live 22 caliber shell from the right front coat pocket of appellant on the night of November 30. This was also turned over to the F.B.I. (Tr. 89-95)

Dr. Lynwood L. Rayford, Jr., the Deputy Coroner for the District of Columbia, testified that he performed an autopsy on Margaret Thomas the day after her death. (Tr. 109-110) He recovered two bullets. (Tr. 110-112) He testified on cross examination that the autopsy revealed the presence of alcohol in Margaret Thomas' blood, in the amount of .22%. (Tr. 113)

The Government's final witness, Warren G. Johnson, a special agent of the Federal Bureau of Investigation, testified he performed ballistics examinations on the various ballistics exhibits turned over to him by the police. He testified that one of the slugs recovered from under the bed

and the four expended cartridge cases found in the room were fired from the gun found in the Booker wash basket. (Tr. 125-130) He testified that the bullets recovered from the decedent's body were fired from a gun "rifled in a similar manner," but could not say whether they were fired from this gun. (Tr. 130-131) He testified that the slugs found in the body, the slugs found under the bed, the four cartridge cases found in the room, the live shell found in the room, and the live shell found in appellant's pocket all had the "same visible physical characteristics." (Tr. 132) He testified that he was not asked to determine whether any finger prints were found or could have been found on the weapon. (Tr. 135)

The Court admitted the revolver into evidence over appellant's objection that it had not been sufficiently connected with him. (Tr. 138)

Appellant moved for a judgment of acquittal at the end of the Government's case. It was denied. (Tr. 139-140)

2. Appellant's Case

Appellant testified that he had lived with Margaret Thomas as husband and wife since the end of 1960 and that they worked together at the same laundry. (Tr. 144-146) He testified that he had not stayed at home on the Friday night before the death of Margaret Thomas because of an argument over Margaret's treatment of the daughter Yvonne. (Tr. 150-151) He said that Yvonne had asked her mother for money to go to the movie and that her mother told her that "If she wanted some money, to get out in the street and get herself a man and get her money." He said he had told Margaret "you should be ashamed of yourself, tell that child such things as that." (Tr. 151) He said he had given Yvonne money to go to the movie and that "then Margaret jumped at me about it." There were no blows exchanged, but this caused him to leave. He spent the night before the death of Margaret Thomas at his sister's. (Tr. 152) He went to work on Saturday morning and worked until 7:30 that night. (Tr. 154-155) He did not talk to Margaret at all that day and was not angry at her. (Tr. 155-156) He testified that he did not have a gun that day and that the weapon introduced by the Government

was not his. (Tr. 156-157) He said, however, that he had seen a gun in Margaret's hands. (Tr. 157)

He testified that he went to his home on Florida Avenue after work that day and that he found there Margaret, Yvonne, and two other children of Margaret Thomas, Vaughn and James. He said that Eric Harris was not there. (Tr. 158) He testified that Margaret opened the door for him and that he asked her where his car chains were. (Tr. 159) This testimony followed:

> "A And she asked me what chains, and I say my car chains. She told me, said I wasn't getting a damn thing out the house to carry to none of my women because I didn't do nothing but use them like a baby use a bottle, and the womens use me that way, and so --
>
> Q Were those the words she used?
>
> A That the word she used.
>
> Q All right.
> What did you say?
>
> A So I just kneel down, feel up under the cabinet where I usually keep my chains, see; and I couldn't feel them. So I got down on my knees where I could feel all the way up there, and by that time she slapped me, and when she slapped me I sprung to my feet and grabbed her by the hand, and just as I grabbed her by the hand out the three kids went." (Tr. 160)

He further testified that

> "She and I start tussling. We was tussling from the kitchen door all the way out til we got in the bedroom. We stumble and fell over a chair, and that broke us loose." (Tr. 161)

This colloquy then ensued:

> Q What next happened?
>
> A Then I ran out the door; the gun went off a couple of times while we was tussling with it.
>
> Q Well, tell me this, sir:
>
> You say that you did not have the pistol. When was the first time that -- in that struggle, sir, that you saw the pistol?
>
> A When she slapped me and I jumped up, grabbed her hand, she shoved it in my face.
>
> Q Did you see her cock the pistol -- what's that?
>
> A She had it drawed towards my face.
>
> Q All right, then -- all right.
>
> Now, tell us, then -- you say the pistol went off; is that correct?
>
> A Yes; in while we were struggling.
>
> Q Any bullets hit you?
>
> A No, sir.
>
> Q And did you see whether or not any of those bullets were lodged in any of the walls or the furniture of the apartment?
>
> A No, sir, I didn't.

Q All right.

Now, then, what next, sir?

A Then we fell over the chair.

Q Both of you?

A Yes, sir; and that broke us loose.

Q All right.

A So I ran out, start running out back the kitchen door, same way I went in, and she yelled to me, said Ain't no need of running because I'll get you when you come back.

Q Yes. And then what?

A So I just ran right on down the alley.

Q Oh, you went out then?

A Yes, sir, I went on out and went down the alley, and I figure -- because I know she was drinking.

Q When you say you know she was drinking, did you see her drink?

A No.

Q Did she have the odor of alcohol on her breath?

A Yes, sir; you could smell it. (Tr. 162-163)

He testified that

"I figured I stay out of there a while, give her a chance to cool off. She may not raise no sand when I go back." (Tr. 164)

He said that when he came back in to the house he went up to the Booker apartment and told Mrs. Booker that he and Margaret "had a struggle over a gun a while ago." (Tr. 165-166) He denied telling Mrs. Booker that he had killed Margaret. (Tr. 166) He said that he then went back down to his apartment and saw Margaret lying in the bedroom on her back. He saw that she had been hurt. (Tr. 167-168)

On cross examination appellant testified that he was not mad at Margaret Thomas when he stayed away the night before. (Tr. 172) He said "I left to keep from arguing--still arguing with her." He said that Margaret had always accused him of going out with other women. (Tr. 173) He said that he had had no conversation on the telephone with Margaret Thomas on the day of her death. (Tr. 174-175)

He further testified that prior to the "tussling" she was pointing the gun at his face and that he began to tussle with her to try "to keep her from shooting me with it." (Tr. 177-178) He stated that during the tussling "We was going round and round like in a circle" and "The gun went off a couple of times before we fell over the chair." (Tr. 182-183)

Appellant testified that the only persons in the apartment at the time, in addition to himself and Margaret, were Vaughn Thomas, James Thomas and Yvonne Thomas. He stated that Harris, Blocker and Sheffield were not present. (Tr. 187-188)

Appellant testified that the bullet found in his pocket was one of a number of shells he had been carrying since Thanksgiving Day. He said that he had gone to Fredericksburg, Virginia to take some people hunting and had carried the ammunition for the group. (Tr. 198-199)

He also stated that he had suffered a paralytic stroke in 1963 which had rendered him unconscious. (Tr. 202-203)

Two psychiatrists from St. Elizabeth's Hospital were also called as witnesses by the defense. Dr. David J. Owens testified that appellant did not have a mental deficiency and that he found no evidence of any mental defect or disorder. (Tr. 212) On cross examination by the Government, Dr. Owens testified that appellant had mentioned having had a stroke and neurological examinations were made by the hospital. He testified that the results were normal, as were also the results of an electroencephalogram test. (Tr. 220-221)

He gave it as his opinion that appellant was not suffering from a mental disease or defect on November 30, 1963. (Tr. 221-222)

The defense also called Dr. Morris M. Platkin of St. Elizabeth's Hospital. He testified that he had also examined appellant and that he did not detect any evidence of a mental disease or defect or disorder. (Tr. 236-237) He said:

> "This man is not the best adjusted individual in the world. He had some occupational instability and some marital instability but not to the degree that I would say that this is symptomatic of a mental illness or a mental defect." (Tr. 237)

On cross examination Dr. Platkin testified that appellant knew the difference between right and wrong on November 30, 1963 and that he "was not suffering from any abnormal condition of the mind which would have substantially affected his mental or emotional processes or substantially affected his mental or emotional processes or substantially impared his behavior controls." (Tr. 245-246) He said that there was no indication from the neurological tests that any stroke or paralysis which appellant might have suffered had affected appellant's mind. (Tr. 247)

Appellant's sister, Bernice De Jarnatte, testified that about August, 1963 she had taken appellant to a doctor because he was paralyzed on one side. (Tr. 257) She said that the condition lasted for several months. (Tr. 259)

Dr. John G. Todd, a general practitioner, testified that he had examined appellant in September 1963. He said that he had no independent recollection of appellant, but from his medical record, he had treated appellant for a stroke involving the right side resulting in partial paralysis and "the patient appeared to be irrational" at the time. (Tr. 273-274)

On cross examination he said he had no opinion as to whether appellant had a mental illness or defect on November 30, 1963. (Tr. 283) The defense thereupon rested. (Tr. 286)

3. The Government's Rebuttal

On rebuttal, the Government recalled Dr. Platkin, who testified that he could find nothing in the information available to him to indicate that any stroke which appellant had "was of such severity that it would effect (sic) his mental condition on November 30, 1963." (Tr. 289)

The Government also called Vaughn Thomas, son of Margaret Thomas. He testified that he was not at the Florida Avenue address on the night of his mother's death, but was at his aunt's house and learned of the death by a telephone call from his sister Yvonne. (Tr. 298-299) The aunt, Hazel B. Clark, testified to the same effect. (Tr. 302) She said that she notified the other son, James Thomas, at his job. (Tr. 303) James Thomas also testified that he was not at the Florida Avenue address at the time of the killing. (Tr. 305)

Ricardo Blocker, 19, testified that he went to the Florida Avenue apartment on November 30, 1963 with Eric Harris and John Sheffield. He said that they watched television with Yvonne and that her mother was sleeping on the bed. (Tr. 308-309) He testified that appellant came into the apartment while he was there and that appellant was there "when the accident occurred." (Tr. 311-312)

John Sheffield, a 15-year old boy, testified that he was also there at the time of the shooting, that appellant had a gun, and fired six times at Margaret Thomas, who was lying on the bed. (Tr. 317)

4. Requests for Instructions and the Court's Charge

At the close of the evidence, defense counsel requested an instruction on manslaughter. The Court rejected the request, stating:

> "I have considered that, sir, and as I view the entire record in the case, I do not think the facts would justify that charge. As you, of course, know, I will give the lesser included offense of second degree murder." (Tr. 325)

The Court instructed the jury on first degree murder that:

> "The essential elements of murder in the first degree applicable to this case are:
>
> 1. That this defendant Paul Belton inflicted a wound or wounds from which the deceased died.
>
> 2. That the defendant had the purpose and the intent to kill the deceased.
>
> 3. That the defendant acted with malice.
>
> 4. That the defendant acted with premeditation and deliberation." (Tr. 358-359)

The Court's explanation of malice was as follows:

> "Now, as to the third essential element, namely, malice: In its ordinary use in every day life, the word malice would indicate a feeling of hatred or ill-will towards another or a feeling of hostility towards an individual.
>
> "In its legal sense, however, malice has a broader significance.

"It is a state of mind showing a heart regardless of social duty, a mind deliberately bent on mischief, a generally depraved, wicked and malicious spirit. Malice, as the law knows it, may also be defined as a condition of mind which prompts a man to do a wrongful act wilfully, that is, on purpose, to the injury of another or to do intentionally a wrongful act towards another without justification or excuse.

"Malice may be either express or implied. Express malice exists where one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse.

"Implied malice, is such as may be inferred from the circumstances of the killing, as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act or when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

"The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so.

"If in a prosecution for a homicide, it is shown that the accused, the defendant, used a deadly weapon in the commission of the homicide, the law infers from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide, and you are instructed as a matter of law that a gun or a pistol is a deadly weapon." (Tr. 359-361)

The Court's instruction on premeditation and deliberation, in entirety, was as follows:

> "I now turn to the fourth element of first degree murder and, namely, that the defendant acted with premeditation and deliberation.
>
> "Premeditation is the formation of the intent or plan to kill, the formation of a positive design to kill.
>
> "Deliberation means further thought upon this plan or design to kill.
>
> "It must have been considered by him, the defendant.
>
> "It is your duty to determine from the facts and circumstances in this case, as you find them, surrounding this killing, whether reflection and consideration amounting to deliberation occurred.
>
> "If so, even though it was of exceedingly brief duration, that is sufficient because it is the fact of deliberation rather than the length of time it continued, that is important; although some appreciable period of time must have elapsed during which the defendant deliberated in order for this element to be established but no particular length of time is necessary for deliberation, and it does not require the lapse of days or hours or even minutes." (Tr. 361-362)

The Court also instructed the jury on second degree murder. (Tr. 363-364)

Defense counsel requested an instruction that the absence of motive could be taken into consideration by the jury. (Tr. 368-369) The Court instructed the jury:

> "There is one suggestion made by counsel, namely, that while the government is not required to prove motive, yet that is an element for you to consider in your determination of the guilt or innocence of the defendant in this case." (Tr. 369)

The Court also instructed the jury on the insanity defense. (Tr. 369-374)

5. The Jury Deliberations

At the close of the instructions, defense counsel renewed his request for a charge on manslaughter. The Court adhered to its previous ruling denying the request. (Tr. 374-375)

The jury retired to deliberate at 11:43 A.M. on January 14, 1965. (Tr. 376) The foreman thereafter sent a message to the Court which said:

> "we, the jury, respectfully request to hear read the transcript of the testimony of Yvonne Thomas and Eric Harris regarding what transpired from the time of the entrance of the defendant and including the actual shooting." (Tr. 376)

The jury note also stated:

> "We further request, Your Honor, for you to reread the portion of the charge to the jury regarding premeditation and deliberation." (Tr. 403)

The Court thereupon had the reporter read the testimony of Yvonne Thomas and Eric Harris to the jury. (Tr. 377-402) It repeated verbatim, without further elaboration, its earlier charge on premeditation and deliberation. (Tr. 404-405)

At 5:50 P.M. on January 14, 1965, the jury returned its verdict of guilty as charged on both counts, with a recommendation of life imprisonment on count one. (Tr. 406)

STATUTES AND RULES INVOLVED:

22 D.C. Code § 2401 provides:

> "Murder in the first degree--Purposeful killing--Killing while perpetrating certain crimes.
>
> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22--401 or 22--402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree."

22 D.C. Code § 2403 provides:

"Murder in second degree.

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

22 D.C. Code § 2405 provides:

"Punishment for manslaughter.

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment."

22 D.C. Code § 3214(b) provides:

"(b) No person shall within the District of Columbia possess, with intent to use unlawfully against another, an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than three inches, or other dangerous weapon."

Rule 31(c), Federal Rules of Criminal Procedure, provides:

"(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> "(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they w e not brought to the attention of the court."

STATEMENT OF POINTS

I. The Trial Court Should Not Have Allowed the Case to Go to the Jury on the Charge of First Degree Murder.

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 28-52, 57-70, 78-83.

II. The Trial Court Inadequately and Inaccurately Instructed the Jury on the Elements of Premeditation and Deliberation.

With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 358-362, 368-369, 376, 403.

III. The Trial Court Erred in Refusing to Instruct the Jury on Manslaughter.

With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 144-201.

SUMMARY OF ARGUMENT

I.

The Government failed to prove the essential elements of premeditation and deliberation beyond a reasonable doubt and the case should not have been submitted to the jury on the charge of first degree murder. There was no evidence that an appreciable time elapsed prior to the killing in which there was in fact reflection and consideration by appellant amounting to deliberation. The circumstances of the killing are as consistent with an impulsive killing by appellant of his common-law wife in the setting of a domestic fracas as they are with a premeditated and deliberate murder. There was no evidence of threats, prior pattern of hostility, motive, or other circumstances from which the inference of premeditation and deliberation could properly be drawn. Evidence that appellant was armed when he entered the premises in which the killing occurred will not alone justify a finding of premeditation and deliberation. The jury should not have been permitted to find these essential elements of the offense through speculation.

II.

The trial court failed to give the jury meaningful instructions on the elements of premeditation and deliberation, although this was a central issue in the case. It failed to emphasize to the jury that an appreciable time must elapse in which there is in fact reflection and consideration amounting to deliberation. Instead it allowed the jury to find that the necessary deliberation by appellant had occurred even if the homicide followed his first thought of killing by only seconds. It failed to call appellant's contentions to the attention of the jury in evaluating the crucial issues of premeditation and deliberation. It failed to relate the instructions on premeditation and deliberation to the evidence in the case and left the jury without adequate guidance as to how to resolve these issues.

III.

The trial court should have allowed the jury to consider appellant's guilt of manslaughter. An instruction on manslaughter must be given in a first degree murder case if there is any evidence to support it and refusal to give it is reversible error. Appellant's testimony that his common-law wife struck him without warning, that she pointed a pistol

at him, and that the gun went off during "tussling" between them raised the inference that any killing committed by him was not malicious and was therefore manslaughter rather than murder. The trial court was not empowered to evaluate the credibility of his testimony in deciding whether a manslaughter instruction was required on the evidence. Its interpretation of the doctrine of implied malice, which apparently led it to the view that any killing by appellant was murder and not manslaughter, was based on an erroneous view of the operation of that doctrine.

ARGUMENT

I. The Trial Court Should Not Have Allowed the Case to Go to the Jury on the Charge of First Degree Murder.

On any permissible view of the evidence, this was not a case of deliberate and premeditated murder. Even on the inferences most favorable to the Government, it is impossible to conclude after a fair reading of the record that the Government proved the crucial elements of deliberation and premeditation beyond a reasonable doubt.

Appellant now stands convicted and sentenced to life imprisonment for the most serious crime known to our law. This statute is designed to deal with the murder that stems from mature reflection, not with the impulsive killing produced by

a domestic fracas. This Court made that distinction clear in Bullock v. United States, 74 U.S. App. D.C. 220, 221, 122 F.2d 213, 214 (1941), cert. denied, 317 U.S. 627, when it said:

> "At common law there were no degrees of murder. If the accused had no overwhelming provocation to kill, he was equally guilty whether he carried out his murderous intent at once or after mature reflection. Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not."

This Court has repeatedly emphasized that the "distinguishing characteristic of first degree murder is deliberate, premeditated, intentional killing." Hansborough v. United States, 113 U.S. App. D.C. 392, 394, 308 F.2d 645, 647 (1962); Tucker v. United States, 115 U.S. App. D.C. 250, 252, 318 F.2d 221, 223 (1963). "Deliberation and premeditation are necessary elements of first degree murder." Fisher v. United States, 328 U.S. 463, 464-465 (1946).[2/]

2/ These elements are what differentiate the first degree murder charge on which appellant was indicted and convicted both from second degree murder and from so-called "felony-murder", in which proof of the commission of one of the felonies enumerated in the statute takes the place of proof

(footnote continued)

It is clear, as Judge Miller has said, that on the return of a conviction for first degree murder, this Court has a duty to scrutinize the record "to determine, from the circumstances preceding and surrounding the killing, whether the jury was justified in finding that it was in fact premeditated." Frady v. United States, ____U.S. App. D.C. ____, 348 F.2d 84, 102 (1965). And "the jury must determine from the circumstances preceding and surrounding the killing whether reflection and consideration amounting to deliberation actually occurred." Ibid.

This Court has held as a matter of law that "some appreciable time must elapse" in which there is in fact "reflection and consideration amounting to deliberation." Ibid.; Bullock v. United States, supra, 74 U.S. App. D.C. at 220, 122 F.2d at 213; Bostic v. United States, 68 U.S. App. D.C. 167, 169, 171, 94 F.2d 636, 638-640 (1937), cert. denied, 303 U.S. 635. Without evidence of the lapse of an appreciable time and without evidence of actual premeditation and deliberation during that time, no jury question is presented. Bullock v. United States, supra, 74 U.S. App. D.C. at 221, 122 F.2d at 214. And where the circumstances "are as consistent with a

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of premeditation and deliberation. See Burton v. United States, 80 U.S. App. D.C. 208, 151 F.2d 17 (1945), cert. denied, 326 U.S. 789; Goodall v. United States, 86 U.S. App. D.C. 148, 150, 180 F.2d 397, 399 (1950), cert. denied, 339 U.S. 987.

killing without deliberation and premeditation as they are with a killing with those elements present . . . ." the evidence is insufficient as a matter of law to support a first degree murder conviction. McAffee v. United States, 70 U.S. App. D.C. 142, 149, 105 F.2d 21, 28 (1939), cert. denied, 310 U.S. 643.

The evidence in the present record is legally insufficient to prove the essential elements of premeditation and deliberation beyond a reasonable doubt. This Court may search its reports in vain to find a first degree murder conviction affirmed on such slender evidence of these elements.

According to the Government's evidence,[3/] appellant entered the apartment and had an exchange of words with his common-law wife about her drinking. The killing occurred immediately thereafter. His words as recounted by the Government witnesses did not contain a threat or manifest any intention to kill her, much less a deliberate and premeditated one. He took the gun from his pocket after the exchange. There is no testimony that he entered the apartment with gun drawn. There is no evidence of appellant's whereabouts or activities

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3/ Appellant's testimony, of course, negates premeditation and deliberation, but it will not be discussed in this section of the Argument, since the Government is entitled to have the evidence construed most favorably to it on this Point.

prior to entering the apartment, nothing to show a process of premeditation and deliberation. The evidence is thus as consistent with sudden impulse as with pre-existing plan. As this Court has said: "There is nothing deliberate and premeditated about a killing which is done within a second or two after the accused first thinks of doing it." Bullock v. United States, supra, 74 U.S. App. D.C. at 221, 122 F.2d at 214.

There is no evidence of any prior threats by appellant or prior manifestation to anyone of intention to kill his wife. There is no evidence of what this Court has characterized as "brooding hostility," by appellant toward his wife. Cf. Mergner v. United States, 79 U.S. App. D.C. 373, 374, 147 F.2d 572, 573 (1945), cert. denied, 325 U.S. 850. There is no evidence of any motive for appellant to premeditate and deliberate on her murder. No reason for the killing appears in this record. This Court has repeatedly recognized the importance of motive in relation to proof of these essential elements: "Motive may be very important in determining whether or not the accused was actuated by deliberate, premeditated malice." McHenry v. United States, 51 App. D.C. 119, 123, 276 Fed. 761, 765 (1921).

Furthermore, the circumstances surrounding the killing are inconsistent with premeditation and deliberation.

Surely an individual who deliberates and premeditates before committing murder would not then burst into a roomful of witnesses to carry out his plan. The descriptions of the killing by Government witnesses point irresistibly in the direction of impulse, not design.

The Government's evidence of appellant's behavior after the killing is also inconsistent with a settled and deliberate plan to murder. Appellant's actions in calling to Margaret Thomas' daughter to help him wipe the blood off the decedent's face, going to a neighbor's apartment to tell her that he had just killed his wife, and making an inept effort to dispose of the murder weapon by leaving it in the neighbor's wash basket are not the indicia of the coldly calculating killer which it is the object of the first degree murder statute to deter and punish.

The mere fact that appellant was armed at the time he entered the apartment will not support the inference of premeditation and deliberation. On the Government's own evidence--that of Yvonne Thomas--appellant had the weapon around the house "long before" that night. It is not as if he had acquired it for the occasion of the killing. On the Government's own evidence--that of Kimmie Booker--he had been carrying a gun

two days previously on Thanksgiving Day when he went hunting. It is not as if this were the first time he had carried a weapon on his person. He lived in the apartment in which the killing occurred and he was coming home after a day's absence. It is not as if he had armed himself to go to another person's premises. See Judge Holtzoff's discussion of the inferences which are permissible from the bare fact that a defendant enters premises armed and commits homicide there, in United States v. Wilson, 178 F. Supp. 881 (D.D.C. 1959). The Court there set aside a first degree murder verdict in circumstances which strikingly resemble those of the present case.

As this Court made explicit in McAffee v. United States, supra, 70 U.S. App. D.C. at 149, 105 F.2d at 28, the mere fact that a deadly or dangerous weapon has been used to commit a homicide will not support the inference of premeditation and deliberation. It is as consistent with a killing without premeditation and deliberation as a killing with those elements.. Nor will a clumsy effort at concealment, like that which appellant made here, support the crucial inference: "that is as consistent with a desire to conceal a lesser crime as it is with a desire to conceal the crime of first degree murder." Ibid.

It is clear that the jury were troubled by the unsatisfactory state of the evidence on the key issues of premediation and deliberation. They specifically asked to have reread those portions of the testimony which dealt with what happened in the moments between the defendant's entry into the apartment and the shooting. They asked to be reinstructed on the elements of premeditation and deliberation. They should not have been permitted to fill in the gaps in the evidence by speculation, for it is only by speculation that it is possible to conclude that appellant premeditated and deliberated on this crime.[4/]

The trial court should not have allowed this case to go to the jury on the charge of first degree murder. Murder in the second degree is the highest verdict which the evidence will support. This Court should therefore order a new trial in which

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4/ As Judge Prettyman has said:

> "Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence." Cooper v. United States, 94 U.S. App. D.C. 343, 346, 218 F.2d 39, 42 (1954).

the defendant will stand trial for second degree murder, not first. Cephus v. United States, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963); cf. Green v. United States, 355 U.S. 184 (1957).

In People v. Caruso, 246 N.Y. 437, 159 N.E. 390 (1927)--a textbook case on these essential elements of first degree murder--the New York Court of Appeals held that a first degree murder conviction could not stand when the evidence left ambiguous whether premeditation and deliberation actually occurred. The Court said, in words which also fit appellant's case:

> "But was there premeditation and deliberation? This seems to have been the question which troubled the jury. They considered their verdict for six hours--twice returning for definitions of homicide and of deliberation and premeditation. Time to deliberate and premeditate there clearly was. [The defendant] might have done so. In fact, however, did he?"
>
> * * *
>
> "With due consideration of all the facts presented there is insufficient evidence to justify a conviction of murder in the first degree. Doubtless, on this record, the defendant might be convicted of some crime, either murder in the second degree, or, if his testimony on the stand is accepted, manslaughter in the first degree. Either verdict might be sustained on the facts. Not the one actually rendered." (159 N.E. at 392)

II. The Trial Court Inadequately and Inaccurately Instructed the Jury on the Elements of Premeditation and Deliberation.

As we have demonstrated, the trial court should not have submitted the case to the jury on the charge of first degree murder. However, even if there had been justification for doing so, it was obligatory on the trial court to instruct the jury fully on the essential elements of the offense. Jackson v. United States, ____U.S. App. D.C. ____, 348 F.2d 772 (1965); Byrd v. United States, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965). The necessity for clear delineation of the governing legal principles and their application to the case at hand is especially great in a capital case, as this one was. Cf. Williams v. United States, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942).

It cannot be said that the essential elements of premeditation and deliberation, as set forth in the first-degree murder statute, are self-explanatory. The numerous decisions of this Court construing their meaning and application to the facts of particular cases attest to that.[5/] In view of the indisputable fact that premeditation and deliberation formed the devisive issue in this case --as shown by the jury's request for rereading of the testimony and for reinstruction on this point -- the trial court should have given the jury an

5/ For example, this Court at one point said that "Deliberation and premeditation may be instantaneous." Aldridge v.
(footnote continued)

this point--the trial court should have given the jury an instruction on the subject which spelled out the meaning of these terms and indicated how they applied to the evidence.

But the court's instructions failed to illuminate the issue for the jury, to appellant's prejudice.[6/] The instructions were brief to the point of cursoriness and abstract to the point of remoteness from the reality of the case. The court did not explain what mental process must take place to

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United States, 60 App. D.C. 45, 46, 47 F.2d 407, 408 (1931), rev'd on other grounds, 283 U.S. 308. Then six years later it approved the opposite rule, that "some appreciable time must elapse." See Bullock v. United States, supra, 74 U.S. App. D.C. at 220, 122 F.2d at 213.

6/ Since objection to the charge on this point as given was not made by counsel below, appellant urges this Court to decide this question under its authority pursuant to Rule 52(b) of the Federal Rules and its supervisory power over the administration of criminal justice in the District of Columbia. See Fisher v. United States, supra, 328 U.S. at 467-468. As this Court said in Kinard v. United States, 68 U.S. App. D.C. 250, 254, 96 F.2d 522, 526 (1938):

> "Although no exception was taken by appellant to the charge when it was given, it is our duty, nevertheless, as an appellate court, to correct any error prejudicial to him, especially in a capital case, or other case where the crime charged is of serious character."

constitute deliberation. It did not highlight for the jury the requirement repeatedly emphasized by this Court that "appreciable time" must elapse in which there is in fact deliberation. Its instruction downgraded this requirement to the status of a subordinate clause ("although some appreciable period of time must have elapsed during which the defendant deliberated in order for this element to be established"). Instead, its point of emphasis to the jury was that "no particular length of time is necessary for deliberation, and it does not require the lapse of days or hours or even minutes."

This charge was taken solely from this Court's discussion of the subject in Bostic v. United States, supra, 68 U.S. App. D.C. at 169-170, 94 F.2d at 638-639. The statement that the time for deliberation "does not require the lapse of days or hours, or even minutes" was pure dictum in Bostic itself because the killing there took place five or ten minutes after the altercation began. See 68 U.S. App. D.C. at 170, 94 F.2d at 639. Even in Bostic, the trial court gave greater emphasis to the requirement that an "appreciable time" must elapse than the trial court did in the present case: the Bostic trial court gave an additional charge just before the jury retired in which it specifically admonished them: "There must be an appreciable period; that is, a period which you, in your

judgment, would think, under the circumstances, was sufficient time for deliberation." 68 U.S. App. D.C. at 171, 94 F.2d at 640.

A charge based solely on the various dicta of Bostic, especially one which tells the jury that the necessary deliberation may occur in a matter of seconds, is not an adequate or accurate statement of the law and has not been for many years. This Court in Bullock held that a killing which occurs within seconds after the defendant thought of doing it is not deliberate and premeditated as a matter of law. 74 U.S. App. D.C. at 221, 122 F.2d at 214.[7/]

7/ A portion of the trial court's charge in Bullock which was approved by a majority of this Court went much more precisely into the meaning of deliberation than did the trial court in this case:

> "Deliberation is the turning over in one's mind of a thought or intention, a consideration and reflection upon the intention or design. Now, that means, in short, that if a party forms a purpose to kill and immediately kills the party whom he purposes to kill, without giving it any thought whatever or turning it over in his mind after he has conceived the thought, he is not guilty of first degree murder. If he purposes to kill him, turns it over in his mind, gives it what you might call a second thought--he might consider the consequences, he might consider whether he should do it or not--if he gives it any consideration by way of turning that thought over in his mind, then that is the element of deliberation. Sometimes it might take

(footnote continued)

Moreover, the Supreme Court made clear twenty years ago that the issue of premeditation and deliberation in jury instructions calls for the greatest precision by the trial court. In Fisher v. United States, supra, 328 U.S. at 470, the Court said:

> "Premeditation and deliberation were defined carefully by the instructions. The contention of the accused that there was no deliberation or premeditation was called distinctly to the jury's attention. The necessary time element was emphasized and the jury was told that premeditation required a preconceived design to kill, a 'second thought.'"

None of these things were done by the trial court in the present case.

The Supreme Court in Fisher specifically approved a model instruction on premeditation and deliberation, which

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> some time to deliberate; other times, you would deliberate rapidly. The turning over in one's mind might be rapid in a given case, and might be slow; but in every case of first degree murder you must have both a purpose to kill and, after that purpose and intent is formed, you must have a turning over of it in your mind to some extent, even though it might be brief." (74 U.S. App. D.C. at 221, 122 F.2d at 214)

was not followed in the present case. It reads as follows:

> "Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.
>
> "Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.
>
> "Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.
>
> "The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period--hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued." (328 U.S. at 467 n. 3)

This instruction, it will be noted, does not de-emphasize the element of deliberation, as did the trial court here, with the words that "although some appreciable period of time must have elapsed during which the defendant deliberated," "no particular length of time is necessary" and it does not

require "even minutes." It brings forcefully to the jurors' minds the mental process of consideration, reflection, pause, and second thought essential to the concept of deliberation. It faithfully carries out and explicates for the jury the crucial statutory distinction between the calculating and the impulsive killer, as the trial court's instruction in the present case did not do. This instruction, or one like it in substance, should have been given in appellant's case.

The trial court failed to direct the jury at any point to the contention raised by appellant's evidence that any killing committed by him was not the result of premeditation and deliberation because the weapon discharged during the course of the "tussling" between him and his wife. Nor did it focus the attention of the jury at any point even on the salient features of the Government's evidence which related to this central issue. The court never made it clear that the jury could find the essential premeditation and deliberation only if they believed beyond a reasonable doubt that the killing was not an impulsive act triggered by the exchange between appellant and his wife after he entered the apartment. They had to find beyond a reasonable doubt that he had premeditated and deliberated on the killing prior to entering the apartment. The evidence thus raised the crucial question of when the intent to kill was formed in appellant's mind and what process

had gone on prior to the shooting. The jury clearly discerned the importance of this inquiry, as shown by their requests during their deliberation. But they were given no guidance on how to apply the law they had been given to the facts they might find or how to evaluate the significance of what they found.

The closest the trial court ever came to relating any of the applicable law to any of the relevant evidence on this issue was its response to appellant's request for a charge on the significance of motive. Yet even here the court's charge was abstract in the extreme: it merely told the jury that "while the Government is not required to prove motive, yet that is an element for you to consider in your determination of the guilt or innocence of the defendant in this case." (Tr. 369) This was not an adequate statement of the applicable principle, which is that "absence of proof of motive [may] be considered as a circumstance in defendant's favor." Lanckton v. United States, 18 App. D.C. 348, 368 (1901) (emphasis added). It certainly did not direct the jury's attention to the one inescapable fact that emerges from this record -- the evidence is totally devoid of a motive or reason for the killing that would support the inference that

appellant committed this crime after premeditation and deliberation.

This Court's responsibility for the development and implementation of correct legal principles, and its duty to furnish guidance to the trial courts, should now lead it to hold that meaningful instructions must be given on these essential elements of premeditation and deliberation and failure to do so requires a new trial under proper instructions.

III. The Trial Court Erred in Refusing to Instruct the Jury on Manslaughter.

It is established that an instruction on manslaughter in a prosecution charging premeditated murder is required if there is any evidence from which a jury might reasonably find guilt of the lesser offense.

In Kinard v. United States, 68 U.S. App. D.C. 250, 96 F.2d 522 (1938), in which the defendant was charged with first degree murder in the killing of his wife, the trial court instructed the jury on first and second degree murder. The court told the jury it could not consider manslaughter, on the ground that the evidence would not sustain a manslaughter conviction, despite the defendant's testimony that the decedent had struck him first and also that she had a weapon during the altercation which led to the killing. The

defendant was convicted of first degree murder. This Court reversed, holding that a manslaughter instruction should have been given. This Court stated:

> "It is true that defendant's testimony was sharply contradicted. It is arguable that the evidence was overwhelmingly indicative of murder rather than manslaughter. But that is beside the point so far as concerns the propriety of the instruction given. It was not the duty of the trial court to weigh the evidence and determine whether the defendant was guilty of murder or manslaughter, but merely to determine the preliminary question of law--whether there was such a complete absence of evidence upon the issue of manslaughter as to require that it be taken from the consideration of the jury. (68 U.S. App. D.C. at 253, 96 F.2d at 525.) [Emphasis added.]

As the Supreme Court said in a similar context in United States v. Stevenson, 162 U.S. 313, 314, 323 (1896):

> "The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is some evidence upon the subject, the proper weight to be given to it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder. * * * A judge may be entirely satisfied from the whole evidence in the case, that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter." [Emphasis added.]

See also McDonald v. United States, 109 U.S. App. D.C. 98, 284 F.2d 232 (1960).

The trial court's refusal to charge on manslaughter violates these principles. There was evidence from which the jury might conclude that appellant had killed without malice and thus was guilty of manslaughter, not murder.

Appellant testified that when he came into the apartment to look for his car chains his wife told him he "wasn't getting a damn thing out the house" and that when he knelt down to look for the chains, she slapped him. When he jumped to his feet, she shoved a pistol in his face and "tussling" ensued during the course of which the gun "went off a couple of times."

Appellant's evidence raised the possible inferences that he killed his wife either in the heat of passion provoked by her or while struggling to defend himself against an assault commenced by her. If either inference were drawn by the jury, he was guilty of manslaughter, not murder. Kinard v. United States, supra, 68 U.S. App. D.C. at 254, 96 F.2d at 526; Bishop v. United States, 71 U.S. App. D.C. 132, 137, 107 F.2d 297, 302 (1940).

The circumstances testified to by appellant -- that the decedent struck him first and that she had possession of

a weapon during the altercation -- are almost exactly the same as those which were testified to by the defendant in Kinard and were held to require a manslaughter instruction. As this Court said there:

> "Provocation sufficient to produce a heat of passion and a resulting absence of malice may give such character to a homicide as to make it manslaughter; the same provocation may, under slightly varied circumstances, justify a person in killing in self-defense. [citation omitted] Heat of passion may be produced by fear as well as by rage [citation omitted] and, if the provocation therefor is adequate [citation omitted], the resulting killing may be manslaughter. The essence of the self-defense situation is a reasonable and bona fide belief of the imminence of death or great bodily harm. [citation omitted] Heat of passion may or may not be present. It is the function of the jury, under proper instructions, to determine whether either defense is available to the accused under the circumstances of the particular case." 68 U.S. App. D.C. at 254, 96 F.2d at 526.

The fact that appellant's version of the shooting may have seemed implausible to the trial court does not change the rule. The Supreme Court said in Stevenson, supra, 162 U.S. at 315:

> "The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force

> of such evidence must be for the jury, and cannot be matter of law for the decision of the court." 8/

The trial court apparently refused the requested instruction on manslaughter because of an erroneous view of the doctrine of malice. The court in effect ruled that malice must be implied as a matter of law from the use of a deadly weapon by appellant. It told the jury:

> "If in a prosecution for a homicide, it is shown that the accused, the defendant, used a deadly weapon in the commission of the homicide, the law infers from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide, and you are instructed as a matter of law that a gun or a pistol is a deadly weapon."

This amounted to a peremptory instruction to the jury that if they found appellant killed his wife with a gun, they must find him guilty of murder, either first or second degree.

8/ The trial court could not conclude as a matter of law on this record that the evidence of provocation was too slight to justify a manslaughter instruction. This Court has stated that the question of the adequacy of provocation to produce a heat of passion negating malice "as it arises in nearly all cases, is one of fact for the determination of the jury." Jackson v. United States, 48 App. D.C. 272, 278 (1919). See also Grant v. United States, 28 App. D.C. 169 (1906).

This Court has accepted the principle of so-called "implied malice" in homicide cases. "'Malice aforethought' may be shown expressly, or may be 'implied' from the commission of the act itself." Bishop v. United States, 71 U.S. App. D.C. 132, 136, 107 F.2d 297, 301 (1939); Sabens v. United States, 40 App. D.C. 440, 443 (1913). But it is also clear from the applicable decisions that the decision whether to infer malice under this doctrine must be left entirely to the jury. If the jury decides to infer malice, the crime is murder. But the jury is also free not to draw the inference, even when malice might legitimately be implied from the act. In that event the crime is manslaughter, not murder.

Thus, malice is not conclusively presumed as a matter of law even from the use of a deadly weapon. Whether malice is express or implied, it still refers to the defendant's state of mind, and the jury must find malice to exist as a fact. As the Supreme Court said in Stevenson v. United States, supra, 162 U.S. at 320:

> "Is it not clearly a question of fact for a jury to determine just what the mental condition of plaintiff in error was in regard to malice?"

See also Allen v. United States, 164 U.S. 492, 494-495 (1896).

This Court described the operation of the doctrine of implied malice with precision in Liggins v. United States, 54 App. D.C. 302, 306, 297 Fed. 881, 885 (1924), when it said:

> "Every person is presumed to intend the natural and probable consequences of his own act, and the use of a dangerous weapon, resulting in a homicide, by one having no right to use the weapon, and in the absence of mitigating facts when he did use it, is always regarded as evidence of the existence of malice aforethought." [Emphasis supplied.]

Use of a deadly weapon to commit homicide is only evidence of the state of mind the law calls malice--it is not the thing itself.

Thus, appellant's use of a gun to kill his wife, if found by the jury, would support a finding of malice and thus a conviction of second degree murder. But it would not require such a finding, and therefore the jury must be allowed to convict him of manslaughter.

That the doctrine of implied malice gives the jury this choice whether the homicide is murder or manslaughter is clearly shown by Nestlerode v. United States, 74 U.S. App. D.C. 276, 279, 122 F.2d 56, 59 (1941). There the defendant killed two persons in different parts of the city through reckless use of his motor vehicle and was charged in two

counts of murder. The trial court charged the jury on both second degree murder and manslaughter. The jury convicted the defendant of manslaughter on one count and of murder in the second degree on the other. This court affirmed both convictions, resting its affirmance of the murder conviction on the doctrine of implied malice. The case plainly establishes that in a situation in which the implied malice doctrine applies, such as the killing in the present case, manslaughter is a permissible verdict.

The trial court therefore erred in denying appellant's request for a manslaughter instruction. This error, together with the others already discussed, requires that he be granted a new trial.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be reversed and a new trial ordered.

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(Appointed by this Court)

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,247

PAUL BELTON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court

for the District of Columbia

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(Appointed by this Court)

I.

Appellant contended in his brief that appellee failed to prove the essential elements of premeditation and deliberation beyond a reasonable doubt and that the case should not have been submitted to the jury on a charge of first degree murder. In particular, appellant pointed out that there was no evidence that an appreciable time elapsed prior to the killing in which there was in fact reflection and consideration by appellant amounting to deliberation.

Appellee's brief convincingly demonstrates the validity of appellant's contention that his guilt of first degree murder necessarily rests on speculation. The doubt created by appellee's failures of proof "is not a visceral or moral one; it is a doubt upon the record; the lack of essential proof creates the doubt as a legal matter." Hiet v. United States, No. 19,716, decided June 22, 1966, slip opinion, pp. 3-4 (Opinion of Senior Circuit Judge Prettyman). The doubt in this case is not eradicated by appellee's efforts to pile inference upon inference, without support in the record and without probative significance to the essential elements of the crime.

Appellee makes the extraordinary assertion that "absent an express statement of intention, it is difficult to posit a more compelling case of deliberate, premeditated murder." Appellee's Brief, p. 20. Analysis of the circumstances, inferences and contentions relied upon by appellee to justify this assertion demonstrates how seriously appellee has misconceived its burden of proof of first degree murder. As we will show, not one of these points supports appellee's conclusions:

1. Appellee contends that appellant and the deceased "had interrupted their regular relationship." (Appellee's Brief, p. 24)

This conclusion is apparently premised on the following scrap of testimony of the decedent's daughter, Yvonne Thomas:

> "Q. On November 30 was Paul Belton still living with you and your mother?
>
> A. Not exactly.
>
> Q. What do you mean by that?
>
> A. He used to come over there and stay once in a while.
>
> Q. Was he staying there regularly every night?
>
> A. No." (Tr. 30)

On its face this testimony does not support appellee's conclusion that appellant and Margaret Thomas were no longer living as man and wife. Whether he stayed with her every night or not is no indication that their regular relationship had been broken.[1/]

Furthermore, there is not s shred of evidence in appellee's case that any "interruption," even if it occurred, was accompanied or actuated by any hostility by appellant towards the deceased. Any such inference of estrangement or hostility is purely speculative. Any "interruption," even if

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1/ Appellee's own witness, the upstairs neighbor, Mrs. Courtney Booker, testified that they were living together:

> "Q. Did you know Paul -- do you know Paul Belton?
> A. I knew him, same as I knew her, two years.
> Q. Now, how did you meet him?
> A. Just downstairs, there where <u>they live at</u>."
>
> (Tr. 59) [Emphasis supplied]

In his opening statement, the prosecutor similarly stated:

> "Testimony will show you that about 8:30 the defendant Paul Belton, who was living as man and wife with Margaret Thomas * * *." (Tr. 25)

it occurred, is therefore devoid of probative effect on the issue of premeditation and deliberation.

2. Appellee contends that appellant and his wife "had argued constantly." (Appellee's Brief, p. 24)

But appellee's own witness, Mrs. Courtney Booker, testified in response to the question whether she had heard any arguments between the deceased and the appellant:

"Well, just now and again, but it wasn't nothing."

(Tr. 65) [Emphasis supplied]

3. Appellee contends that "appellant had berated the deceased a few hours before the crime for her apparent infidelity" and "accused her of infidelity." (Appellee's Brief, pp. 14, 24)

This inference apparently depends entirely upon the following testimony of Yvonne Thomas:

> "Q. Could you -- did you hear any conversation between your mother and Paul Belton except that which you have mentioned before the shooting?
>
> A. Well, all I -- way [sic] I know he called and all I could hear that -- some [sic] he was saying about some man came on the job to pick her up, or something like that, but I didn't pay any -- too much attention to it.

* * *

"Q. Now, did your mother and Paul have any argument on the 30th of November?

A. I don't know what they was [sic] doing over the phone."

(Tr. 35, 40-41)

This is all there is to support appellee's inference that appellant accused Margaret Thomas of infidelity on the day of her death. The inadequacy of this incoherent testimony as evidence of premeditation and deliberation is obvious. The words themselves simply do not support the construction put on them by appellee. There is nothing in this testimony about any "berating," or any "accusing," or any "infidelity." Appellee would apparently have this Court affirm a first degree murder conviction by imagining what might have been said during an alleged telephone conversation to which nobody paid any attention.

4. Appellee contends that appellant "burst into her room armed with a loaded gun and 10 rounds of ammunition." (Appellee's Brief, p. 24)

The statement that appellant "burst" into the premises, which appears at several places in appellee's Brief (pp. 18, 21, 24) is appellee's word, not that of any witness in the case. It is not an accurate characterization of any testimony or a permissible inference from any evidence in this record. All the witnesses who described appellant's entry stated that he "came" into the premises. He did not enter with gun drawn. On appellee's own evidence, appellant drew out the gun and fired only after an exchange of words with his wife following his entry.

Furthermore, on appellee's own evidence, appellant was returning to his own premises, where he had lived with his wife for two years, carrying a weapon that he had had "around the house long before" that night; moreover, he had taken a weapon hunting with him two days before. (Tr. 42, 57, 83). These facts cannot support the conclusion of premeditation and deliberation to kill. The situation is precisely that described by Judge Holtzoff in United States v. Wilson, 178 F. Supp. 881, 886 (D.D.C. 1959):

> "There appears to be no evidence supporting a finding of premeditation and deliberation other than the fact that the defendant entered the premises carrying a pistol in his overcoat pocket. This is not a case in which such a deduction is supported by evidence of prior threats or by some indication of a hostile attitude towards the deceased."

On such evidence, Judge Holtzoff held that a first degree murder conviction could not stand.

Appellee states at another point in its Brief,

> ". . . the fact that he came possessed of sixty-six live bullets for the gun indicates that he had planned in advance to use it." (Appellee's Brief, p. 19) 2/

But there is no evidence in the record that appellant planned in advance to use it <u>on his wife</u>, which is the sole

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2/ Appellee seems unable to decide whether appellant came armed with 10 bullets or 66 bullets, another reflection of the unsatisfactory and confused state of the record. Det. Sgt. Buch's testimony would indicate that approximately five bullets were fired in the room; one bullet was recovered from appellant's pocket; six were found in the gun in the Booker wash basket; and 54 in the wash basket. (Tr. 85-87) The only positive ballistics linkup established by the evidence was between the gun and one of the slugs and four of the cartridge cases found in the room where the death occurred. (Tr. 125-130)

relevant inquiry. Appellee's own evidence showed that he took a gun hunting with him two days previously. Appellant's testimony was that the bullet found in his pocket was one of a number of shells he had been carrying since Thanksgiving Day, when he went to Fredericksburg to go hunting and carried the ammunition for the group with him. (Tr. 198-199) 3/

5. Appellee contends that "utterly without provocation," appellant "drew out the pistol and commenced firing." (Appellee's Brief, p. 24)

Appellee's own evidence showed that the killing followed an exchange of words between appellant and his wife about her drinking. 4/ It is impossible, except by speculation, to conclude merely from the act of firing the pistol that appellant

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3/ As a matter of common sense, it is more reasonable to conclude that appellant's possession of 66 bullets provided corroboration of his testimony that he had gone hunting, than that he planned to use 66 bullets to kill his wife.

4/ Decedent's blood contained .22% alcohol at the time of the autopsy. (Tr. 113) .15% alcohol, or more, constitutes prima facie proof that a person is under the influence of intoxicating liquor. 40 D.C.C. § 609a.

had formed and deliberated upon the intent to kill prior to this altercation, rather than killing as an outgrowth of the altercation. Firing the pistol in this fashion may in itself justify the inference of intent to kill, but it does not prove the other elements.[5/]

At another point, appellee states that appellant fired "a series of six shots" and compares this case to Frady v. United States, 121 U.S. App. D.C. 78, 348 F.2d 84, 102 (1965), cert. denied, 382 U.S. 909, where this Court upheld a first degree murder conviction stating that the "vicious assault . . . was prolonged sufficiently before the final blows were struck to show a deliberate and premeditated killing." (Appellee's Brief, p. 20)

The assault in Frady lasted at least ten minutes, culminating in the striking of the fatal blows. In the present case, the bullets were fired one after the other, in continuous sequence. The Government's evidence failed to show

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5/ The trial court correctly instructed the jury that they might consider the use of the weapon on the essential element of intent to kill, which is not in issue on this appeal. (Tr. 359)

whether the first, or the last, or one in between, was the fatal bullet; the coroner could not even tell which of the two bullets which struck the decedent was fired first. (Tr. 114-115) In any event, the rapid firing of the bullets is fully as consistent with an impulsive killing as with a deliberate one. 6/

6. Appellee states that "his bullets expended," appellant "reloaded his weapon." (Appellee's Brief, p. 24)

The evidentiary significance of this is utterly mysterious. There is no evidence that appellant continued to fire the weapon after reloading. Even if he had, deliberation occurring after the firing of the fatal shot would obviously be insufficient to establish this essential element.

7. Appellee states that "moments thereafter he told of Margaret Thomas' death calmly and without visible signs of emotion." (Appellee's Brief, p. 24)

6/ This Court should also disregard the statement which appears in appellee's Counterstatement of the Case that appellant "[aimed it [the gun] at Margaret Thomas' head]" (Appellee's Brief, p. 3) This statement is not an accurate quotation from, or a fair paraphrase of, the testimony of any witness in the case. Any inference of deliberate plan from the way in which the gun was fired is without support in the record.

The evidentiary significance of this is equally unclear. The testimony on this point came exclusively from the elderly upstairs neighbor, Mrs. Courtney Booker. Insofar as this witness gave testimony bearing on appellant's state of mind with respect to premeditation and deliberation, her testimony clearly indicates that appellant had not thought about killing his wife prior to doing so. Mrs. Booker testified as follows:

> "A. He just said he had killed her, and I said, 'What did you do that for?'
>
> Q. All right.
>
> And then what did he say?
>
> A. I believe he said he didn't know, or something of the kind, like that." (Tr. 66)
> [Emphasis supplied]

This is the sum total of appellee's case to this Court on the essential elements of premeditation and deliberation.[7/] It abounds in conjecture. It is demonstrably insufficient in evidence.

7/ Most of the factors discussed above are afterthoughts by appellee, as a comparison of appellee's Brief with the trial prosecutor's closing argument to the jury clearly discloses. (See Tr. 329-335, Tr. 349-350)

II.

Appellant reiterates his position, set forth in Point II of his Brief, pp. 37-45, that the trial court inadequately and inaccurately instructed the jury on the elements of premeditation and deliberation. Contrary to appellee's assertion that he is "conceding that these elements were correctly defined in the charge . . . ." (Appellee's Brief, p. 21), he has made no such concession. Point II of appellant's Brief makes explicit the errors and omissions in the charge.[8/]

III.

Appellee has also failed to demonstrate a tenable ground on which the trial court could properly have denied the requested instruction on manslaughter.

8/ In this connection, there should be noted the model jury instruction on premeditation and deliberation in the Manual of Criminal Jury Instructions for the District of Columbia recently published by the Junior Bar Section of the Bar Association of the District of Columbia: it is based on Fisher v. United States, 328 U.S. 463 (1946), unlike the instruction in the present case, which was derived entirely from Bostic v. United States, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), cert. denied, 303 U.S. 635. See appellant's Brief, pp. 41-43.

Appellee appears to contend that appellant's testimony was insufficient to bring the issue of manslaughter into the case, even though portions of his testimony admittedly raised the permissible inferences that he killed his wife either in the heat of passion provoked by her or while struggling to defend himself against an assault commenced by her.[9/] Appellee's position seems to be that this testimony by appellant could be disregarded in framing the instructions, simply because appellant at another point in his testimony denied shooting his wife.

This contention by appellee disregards the most elementary power and function of the jury: that, in evaluating the credibility of any witness, the jury may believe all of

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9/ The relevant testimony is set forth at pp. 10-14 of appellant's Brief, and discussed at pp. 47-48.

The fact that appellant relies on his own testimony to justify the manslaughter instruction in no way weakens his right to the instruction:

> "In criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. He is entitled to have such instructions even though the whole testimony in support of the defense is his own." Tatum v. United States, 88 U.S. App. D.C. 386, 391, 190 F.2d 612, 617 (1951).

his testimony, none of his testimony, or some of his testimony, as it deems appropriate. See, e.g., Shelton v. United States, 83 U.S. App. D.C. 257, 169 F.2d 665 (1948), cert. denied, 335 U.S. 834.

The jury were therefore entitled to believe any part of appellant's testimony and disbelieve any other part. Thus, if the jury chose to believe appellant's testimony that his wife provoked an altercation and struck him first, and at the same time chose to disbelieve his denial of killing her, they could find him guilty of manslaughter and should have been allowed to do so. Similarly, if the jury chose to believe appellant's testimony that his wife had possession of the weapon and pointed it at him during the "tussling" between them, and at the same time chose to disbelieve his denials of starting the altercation, of ever having possession of the gun, and of killing his wife, they could likewise find him guilty of manslaughter and should have been allowed to do so. The fact that appellant's testimony, if believed in toto by the jury, might exonerate him entirely, cannot deprive the jury of power to disbelieve his claims of innocence and yet find him guilty of a lesser offense than murder.

This Court recognized the precise principle for which appellant contends in the recent case of Broughman v. United States, No. 19,529, decided May 2, 1966. There the testimony of the complaining witness, Weedon, if fully believed, proved the defendant's guilt of robbery. The defendant did not testify, but his codefendant, Blake, gave testimony which, if fully believed, showed a justifiable assault and there exonerated the defendant of any crime. The trial court refused an instruction on the lesser included offense of simple assault. This Court reversed, holding that the instruction should have been given. This Court said:

> ". . . an instruction on the lesser included offense of simple assault would be required if there were evidence of this lesser crime. The Government argues that there was none. It says that Blake's testimony shows a justifiable assault and that Weedon's testimony shows a robbery. The assumption underlying this argument is that the jury would have to believe all or nothing of either Blake's or Weedon's testimony. We disagree.
>
> "The fact that Blake's testimony raised an issue whether appellant was guilty of any crime at all is not inconsistent with appellant's claim that this same testimony raised an issue whether a lesser included offense had been committed. Nor would the jury have to credit all of Blake's testimony. In Young v. United States we held:

> "Even when instructed on the lesser included offense of simple assault it would be permissible for the jury to totally disbelieve . . . [the witness] or to believe that part which tended to exculpate appellant from an intent to rob. [114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1963), Emphasis supplied]" Slip Opinion, pp.2-3.

That same principle governs here. The jury could disbelieve appellant's claim of innocence and yet believe that part of his testimony which exonerated him from the malice necessary to murder.

Appellee also fails to distinguish this Court's decision in Kinard v. United States, 68 U.S. App. D.C. 250, 96 F.2d 522 (1938), which requires a manslaughter instruction on a record like that in the present case. Appellee claims that Kinard differs from the present case because the defendant there testified that both he and the decedent had weapons at one point in their altercation and because he relied on an explicit theory of self-defense.

These are distinctions without substance. This Court made clear in Kinard the basis for its holding:

> "We are satisfied that there was some evidence in the present case tending to show that the killing occurred while appellant was in a heat of passion provoked by the actions of his wife, the deceased; and, consequently, that the trial court, [in instructing the jury they could not convict of manslaughter] invaded the province of the jury." 68 U.S. App. D.C. at 255, 96 F.2d at 526.

The evidence in Kinard tending to show that the killing occurred in a heat of passion provoked by the actions of the defendant's wife was virtually the same as that in the present case. Nothing in the opinion turned on how many weapons there were, who had them, or when.

Whether or not appellant or his trial counsel proceeded on the theory of self-defense in so many words is completely irrelevant to his right to a manslaughter instruction based on the possible use of excessive force in defending against an assault commenced by the decedent. Since the evidence in this case permitted such an inference, the trial court was required to instruct on manslaughter. This Court held in Womack v. United States, 119 U.S. App. D.C. 40, 336 F.2d 959 (1964):

> "A defendant is entitled to an instruction on any issue fairly raised by the evidence, whether or not consistent with the defendant's testimony or the defense trial theory."

Contrary to appellee's assertion (Appellee's Brief, p. 29), it is also plain that the trial court, in denying a manslaughter instruction, proceeded on an erroneous view of the doctrine of implied malice. The court's instruction did not allow the jury to draw, or not draw, the inference of malice as they saw fit.[10/] They had to convict of murder or acquit.

Since malice is an essential element of both first and second degree murder, the trial court's error in this instruction on malice would itself be sufficient to justify

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10/ Also contrary to appellee's contention, the trial court's instruction on implied malice is not in accord with the model instruction in the Junior Bar Section's Manual of Criminal Jury Instructions. Instruction no. 83, p. 63, makes it clear that implied malice is a permissive inference and that a peremptory instruction taking the issue from the jury is unjustified:

> "If a person uses a deadly weapon in killing another, malice <u>may</u> be inferred from his use of such weapon, in the absence of explanatory or mitigating circumstances. You are not required to infer malice from the use of such weapon, but you may do so if you deem it appropriate." [Emphasis supplied]

reversal for a new trial. See Weakley v. United States, 91 U.S. App. D.C. 8, 198 F.2d 948 (1952).

For these reasons, the refusal of the trial court to instruct the jury on manslaughter requires reversal of appellant's conviction for first degree murder.

Respectfully submitted,

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(Appointed by this Court)

Dated: July 14, 1966

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,247

PAUL BELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
CAROL GARFIEL,
Assistant United States Attorneys.

Cr. No. 35-64

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Was there sufficient evidence of premeditation and deliberation to submit to the jury the question of appellant's guilt of first degree murder where the evidence disclosed that appellant had ceased living regularly with his victim, that on the afternoon of her death he accused her of infidelity, that he came to her apartment with a loaded gun and ten more rounds of ammunition for it, that upon his entry into the room he walked to the bed where she lay, unarmed, spoke one sentence to her, and, utterly without provocation, commenced firing six shots, one of which entered her brain and killed her, that he reloaded his gun when it was empty, and that, moments later, he told of the death of his wife calmly and without signs of emotion?

2) Were the instructions on premeditation and deliberation, with which experienced trial counsel expressed satisfaction, plainly erroneous?

3) Where the Government's evidence contained no indication that appellant shot in the heat of provocation or in self-defense, and appellant's story was that he did not kill the deceased, did not the trial court properly decline to permit the jury to convict appellant of manslaughter?

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OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On the night of November 30, 1963, Margaret Thomas was shot to death in the home that she had shared with appellant Paul Belton. By indictment filed January 20, 1964, appellant was charged with first degree murder (22 D.C. Code § 2401) and possession of a prohibited weapon (22 D.C. Code § 3214(b)). A motion for a mental examination, filed by appellant's retained counsel, was granted on April 1, 1964. Three months later, the Superintendent of Saint Elizabeths Hospital informed the court that examination had revealed appellant to be competent to stand trial and without mental disorder then and at

the time of the homicide. On January 12, 1965 the District Court entered an unopposed order finding appellant competent, and trial commenced before Judge Richmond B. Keech and a jury. Appellant was convicted of first degree murder with a recommendation of life imprisonment, and of the weapons offense. On February 19, 1965, having been informed that appellant had previously been convicted of a felony, the court sentenced appellant on the murder count to imprisonment for life, and on the weapons count to imprisonment for from one to three years, the sentence to run concurrently.[1] Appellant's motion for leave to appeal *in forma pauperis* was granted by the District Court on March 2, 1965, and this appeal followed.

The Government's direct case.

Appellant Paul Belton and the deceased, Margaret Thomas, lived together for some four years; their last home was at 1814 Florida Avenue, N.W. (Tr. 28-30, 37-38). They fought "most of the time", according to their upstairs neighbors (Tr. 65-66, 82). Some time before November 30, appellant ceased to live at 1814 Florida Avenue with Mrs. Thomas, returning only occasionally (Tr. 30). On the afternoon of November 30, before dinnertime, Yvonne Thomas, the daughter of Margaret Thomas, overheard part of a telephone conversation between appellant and her mother, in which appellant "was saying about some man came on the job to pick her up . . . ." (Tr. 35, 40-43.)

That night, three young men, Eric Harris, John Sheffield, and Richardo Blocker came to the Thomas home to visit Mrs. Thomas' son, James. The seventeen-year-old Yvonne was also home that night. The four young people and Mrs. Thomas gathered in the bedroom of the first

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[1] Appellant raises no issue in this Court regarding the propriety of his conviction on count two and accordingly the judgment of conviction for possession of a prohibited weapon should be affirmed.

floor apartment, where the former watched television while Mrs. Thomas lay on the bed. (Tr. 28, 30-31, 43-48, 50-51.) At about 8:30 that night, in the words of Yvonne Thomas,

> all of a sudden Paul Belton came in the back door. He went straight toward the bed and he told Margaret, he said, "I thought you didn't drink any more," [2] and Margaret looked at him and told him—and asked him, was he crazy.
>
> So he pulled the gun out of his pocket [, aimed it at Margaret Thomas' head,] and started shooting it, and then we grabbed our coats and ran out the door and then we came back, and as we started out—he had shot the gun and then he shot about six times.
>
> He was getting ready to reload the gun, so we ran, and then I came back to the door, I looked into the door. He called me but I didn't come.
>
> So then I went back out the door, and, as a matter of fact, Margaret was laying on her back then and blood was coming from her face, and he had a rag in his hand wiping it off.
>
> He told me come see about my mother, and I told him no . . . .
>
> (Tr. 31-32, 33, 34, 41.)

As Yvonne left the room, her mother still lay on the bed, her hands empty (Tr. 33).

Eric Harris described appellant's entry into the room much the way Yvonne Thomas did:

> . . . Mr. Paul came in at around about, I'd say, after 8:00 o'clock; and so after he came in he had a gun with him; and so he was—he says something to Miss Thomas; and so then he started shooting at her, and so then she looked up at him, asked him was he crazy, then laid back down.

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[2] Both Yvonne Thomas and Eric Harris testified that Mrs. Thomas was sober on the night of her death (Tr. 41, 50-51). The autopsy disclosed the presence of .22 percent alcohol in the blood of Margaret Thomas, but from this the coroner could not determine whether she had been intoxicated or even unsteady on her feet (Tr. 113-14).

> So he shot six times; so then he started reloading the gun and so then after that we picked up our coats and we left.
>
> (Tr. 48-49, 50, 51-52.)

According to both Yvonne Thomas and Eric Harris, appellant was some feet away from the bed upon which Margaret Thomas lay when he began firing (Tr. 32-33, 49). Both youngsters recalled that the gun he wielded had a white handle (Tr. 34, 49). Yvonne recalled having seen this gun "around the house", in appellant's custody, "long before" the night of the murder (Tr. 42). She had never seen her mother with a pistol (Tr. 41-42).

Mrs. Courtney Booker, who lived upstairs from the Thomas apartment, testified that she saw appellant on the evening of the murder sometime around 6 or 7 p.m., outside the apartment building (Tr. 58, 60). Sometime later, appellant came up to her apartment and while Mrs. Booker stood at her bathroom door appellant told her that "Margaret was gone." She asked, "Gone where? Is she dead" and appellant replied that she was. (Tr. 61.) Asked to relate everything that appellant had said that night, Mrs. Booker recalled that he had also said to her, "I killed her" (Tr. 64-65). She asked him why he had done that, and appellant said he did not know (Tr. 66). Mrs. Booker testified that appellant was neither excited nor nervous nor did he appear to have been drinking. Rather, appellant was calm and collected in demeanor. (Tr. 65-68).

While walking his beat shortly after the shooting, Private Holmes Husk came upon the scene in front of 1814 Florida Avenue, N.W. Observing the ambulance summoned by Yvonne Thomas, Private Husk spoke with the ambulance personnel and then entered the Thomas apartment (Tr. 32, 71-73). His attention was drawn to the body of Margaret Thomas, lying apparently lifeless across the bed in the middle room of the apartment. The officer observed what appeared to be bullet holes in her head, one in the right jaw and the second near her right eye. (Tr.

73.) There were two empty .22 caliber cartridges laying on the floor beside the bed, which were later removed by Detective Sergeant Jack Buch of the Homicide Squad (Tr. 75, 94). There were several people in the room, including appellant, whose person, when searched, revealed nothing (Tr. 74).[3]

Sergeant Buch arrived at the Thomas apartment at about 9:10 p.m. He saw the lifeless body of Margaret Thomas lying on her back on the bed with what appeared to be a puncture wound in her right cheek and another, apparently a gunshot wound, above her right eye. The body was clothed in a blouse and skirt, but its feet and legs were bare.[4] On the bed, to the right of the body, were three small holes, which went through the sheet through the covers, and through the mattress. From under the bed, the sergeant recovered two lead slugs (Government Exhibit 7-D). At the foot of the bed, at the feet of the body, were four .22 caliber expended shell casings (Government Exhibit 7-C). Finally, on the left side of the bed, Sergeant Buch found one live .22 caliber shell (Government Exhibit 7-A). The room, he testified, was "disarrayed", but to his experienced eye there did not appear to have been any violent struggle or fight. He found no gun in the room. (Tr. 85-86, 92-94.) From the right front pocket of appellant's coat, Sergeant Buch recovered a live .22 caliber shell (Government Exhibit 7-B) (Tr. 93, 97).

On the night of the murder, Miss Kimmie Booker, daughter of Mrs. Courtney Booker, had left some wet wash in a basket immediately inside the door of the bathroom of the Booker apartment (Tr. 79-80). When she went to hang up the clothes the following morning, she

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[3] Private Husk also observed what he took to be a bullet hole on the wall in back of and about three feet higher than the bed (Tr. 74, 75-76). Sergeant Buch also saw several holes in the plaster throughout the room, but was of the opinion, in part because of the lack of plaster underneath the holes, that they had been there "for some time" (Tr. 99-100).

[4] Government Exhibit 8, a photograph, portrayed the body of Margaret Thomas as it lay on the bed when Sergeant Buch entered the room (Tr. 95-99).

found in the basket of clothes some bullets (Tr. 80-81). By 9:30 a.m. Sergeant Buch had arrived in response to Miss Booker's call. Underneath several layers of wash in the basket he found a .22 caliber revolver (Government Exhibit 6-A), fully loaded with six live .22 caliber shells (Government Exhibit 6-B), 54 other live .22 caliber shells, a pocketknife, and 54 cents in change (Tr. 86-90, 101-02.)

The autopsy performed by the deputy coroner, Dr. Linwood Rayford, revealed two bullet wounds in the body of Margaret Thomas. One bullet entered the front of her skull immediately above her right eye and travelled through the brain towards the left, coming to rest in the left occipital lobe of the brain. This wound caused the death of Margaret Thomas, and would have rendered her instantly unconscious. The other bullet entered the lower edge of the right jaw and coursed downward, leaving the jaw below the chin, re-entering the body in the lower neck, and finally coming to rest in the chest. This second bullet would not necessarily result in death. (Tr. 36-37, 109-10, 115-16.) Dr. Rayford could not tell which bullet had been fired first (Tr. 114), nor could he determine whether the bullets had been fired from a sitting or standing position (Tr. 116-17). However, he testified, the absence of powder burns indicated that the shots had not been fired from a very close range (Tr. 116-17).

The fatal bullet (Government Exhibit 6-C) and that found in the chest of Margaret Thomas (Government Exhibit 6-D) were delivered by the coroner to Sergeant Buch (Tr. 110-13). These bullets, together with the slugs and cartridges found around the bed and in appellant's pocket and the gun found in Mrs. Booker's wash, were submitted to the FBI laboratory for examination (Tr. 89-91, 94-95, 118-25). The tests made by the FBI firearms expert, Warren Johnson, established that one of the lead slugs found underneath the bed upon which Mrs. Thomas lay (Government Exhibit 7-D),[5] and the

[5] The second lead slug was too multilated to enable the agent to form an opinion as to whether it had been fired from Gov-

four expended cartridges found at her feet (Government Exhibit 7-C) had definitely been fired from the gun (Government Exhibit 6-A) (Tr. 125-30). The bullets found in the body of Margaret Thomas were too mutilated to permit definite identification, but they had been fired from a weapon rifled in a similar manner to the gun discarded in the Booker apartment (Tr. 130-31). Moreover, these bullets and those found under the bed were of the type normally loaded in cartridge cases like those found at the foot of the bed (Tr. 131-32) and these four bullets [6] and the expended cartridge cases [7] had the same visible physical characteristics as three of the live cartridges found in Mrs. Booker's wash [8] and of the live cartridge found at the foot of the bed [9] (Tr. 132). The bullets, the cartridge cases, the gun, and the picture of the body were received in evidence, the Government rested, and appellant's motion for judgment of acquittal was denied (Tr. 138-40).

Appellant's defense

Appellant's defense was twofold—he did not kill Margaret Thomas, but if he did kill her he was temporarily insane. His version of the events of the night of November 30, 1963 conflicted in virtually every respect with the testimony of the other witnesses.

Appellant testified that he had known Margaret Thomas since 1960, when he had met her at the laundry where they both worked (Tr. 82-83, 144-45). They began to live together as husband and wife at various addresses in the District of Columbia (Tr. 145-48). On the night before Mrs. Thomas' death, appellant claimed, there had been an argument when Yvonne asked her mother for

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ernment Exhibit 6-A, although both bullets in Government Exhibit 7-D had the same class characteristics (Tr. 125-29).

[6] Government Exhibits 6-C, 6-D, and 7-D.

[7] Government Exhibit 7-C.

[8] Government Exhibit 6-B.

[9] Government Exhibit 7-A.

some money to go to the movies and her mother had told her to "get out in the street and get herself a man and get her money." Appellant chastised Margaret Thomas for this and gave Yvonne $2.00. After the girl left, appellant claimed, his wife began cursing him and so he too left their home, to spend the night with his sister. (Tr. 150-53, 172-74.)

Appellant testified that he worked all day on Saturday, November 30, and that when he finished, at 7:30 or 8 o'clock, he returned to the Florida Avenue apartment (Tr. 154-55). When he arrived home, only his wife and her three children, Yvonne, Vaughan, and James Thomas were present (Tr. 158, 186-88). Appellant denied that Eric Harris, John Sheffield, or Richardo Blocker were there at any time that night (Tr. 158, 187-90). He testified that he knocked on the door, which was opened by Margaret Thomas, who was fully dressed (Tr. 159). Once inside, appellant asked where his car chains were. Margaret Thomas retorted that he would not get "a damn thing out of the house to carry to none of [his] women because [he] didn't do nothing but use them like a baby use a bottle, and the womens use [him] that way . . . ." (Tr. 159-60.) Appellant did not reply, although he had not been going with any other women,[10] but merely knelt down to search under a cabinet for his chains (Tr. 160, 173-74).

Then, according to appellant's story, Margaret Thomas slapped him. He sprang to his feet and grabbed her by the left hand. In her right hand, appellant claimed, his wife held a pistol, which she pointed at his face. Her three children fled out of the apartment. (Tr. 160, 162, 175-78, 181, 190-91.) The two adults began "tussling", appellant trying to gain possession of the gun. They travelled from the kitchen door into the bedroom, still "tussling". During these moments, appellant claimed, "the gun went off a couple of times", while pointed toward the wall. (Tr. 161-62, 177-78, 181-84.) In the bedroom, the two fell over a chair, Margaret Thomas back-

[10] Appellant claimed that Mrs. Thomas even accused him of going with his own stepdaughter (Tr. 173-74).

wards and appellant forwards. The fall "broke [them] loose". (Tr. 161, 163, 182-83, 185-86.) As he fled, he heard Margaret Thomas cry "Ain't no need of running because I'll get you when you come back" (Tr. 163, 185). *At that point, appellant testified, Margaret Thomas had not been shot or hurt* (Tr. 163-64, 167).

Appellant went down the alley to a store, waiting for his wife to "cool off" (Tr. 163-64, 194-95). Some five or ten minutes later, he returned to the house. The door to his apartment was open but he passed by it and went upstairs to the Booker home. (Tr. 164-65, 195.) There he told Mrs. Courtney Booker that he and Margaret Thomas had had a struggle over a gun a while before. However, he denied telling her he had shot and killed Mrs. Thomas or even that "Margaret is gone". (Tr. 165-66, 193-94.) Moreover, appellant denied ever having been in the Bookers' bathroom and specifically denied that he had deposited anything in their wash (Tr. 201). After some minutes, appellant went down to his apartment, where he found his wife lying on the bed in the bedroom, injured (Tr. 167-68, 196). He testified that he saw no blood on her body and denied that he had wiped blood from her with a handkerchief (Tr. 196). Shortly thereafter, the police arrived (Tr. 169).

Appellant denied that he had been angry with Margaret Thomas or that he had called her during the day of November 30 (Tr. 155-57, 172-75). He claimed that he had first seen Government Exhibit 6-A, the gun, on the night of November 30, in the hands of Margaret Thomas, and denied that he had kept a gun in the apartment. (Tr. 156-57, 169, 185, 197.) He admitted, however, that Government Exhibit 7-A, the live shell, had been in his pocket, claiming that he had put it there on a Thanksgiving hunting trip when some people had asked him to carry ammunition, although only shotguns and rifles had been used that day. (Tr. 198-99).[11]

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[11] Miss Kimmie Booker testified that appellant had gone hunting on Thanksgiving Day with a gun; however, she did not see the gun that he carried then (Tr. 83).

Appellant admitted that he had been convicted of manslaughter in South Carolina in 1949 and that he had served seven years in prison for that crime (Tr. 170-72).

Appellant and his sister, Bernice De Jarnatte, claimed that in August or September of 1963 he had suffered a stroke which had left his right side paralyzed. Miss De Jarnatte had brought appellant to the hospital on the night of his illness but had left before he could be seen by a doctor. Later, Dr. John Todd was called once or twice to attend appellant at his sister's home and found appellant's right side partially paralyzed from a mild stroke and his facilities slightly impaired. Unfortunately, the doctor's office records relating to appellant had been misplaced and he had very little recollection of appellant's condition. Appellant claimed that on the night of Margaret Thomas' death he suffered residual paralysis from this stroke which prevented him from moving more than the thumb and index finger of his right hand. This, he contended, would have required him to use both hands had he had possession of the gun to fire. (Tr. 178-81, 202-06, 226-27, 255-66, 271-84.)

Dr. David Owens and Dr. Mauris Platkin of Saint Elizabeths Hospital testified that although the hemmorhage in the brain that constitutes a stroke is irreversible, and that had appellant suffered a stroke within the past two years some residue of that brain damage would appear on neurological examination, the results of the tests performed on appellant at the hospital were normal (Tr. 219-21, 224-25, 228, 247-48.) There was some indication of hyperasthesis on appellant's right side, but any paralysis resulting from a stroke would have been slight, according to Dr. Platkin, since it was limited to appellant's right arm, required only one visit from a doctor, and did not appear in the neurological test results (Tr. 223, 246-47).

To support his defense of temporary insanity, appellant called Drs. Owens and Platkin, who testified that in their opinion on the day of the murder appellant was not

suffering from either a mental defect or mental disease. Nor had he shown any signs of mental disease or defect on June 22, 1964, when the doctors had observed appellant at a medical staff conference. (Tr. 208-12, 221-22, 234-38, 245-46.) Both doctors agreed that when observed at the hospital appellant was not hallucinating or suffering from delusions, his attention, perception and comprehension were all within the average limits of normalcy, and his answers were logical and relevant (Tr. 221, 245). The doctors reached their opinion despite the report of appellant's stroke, for, as Dr. Platkin testified in rebuttal, there is no necessary correlation between stroke and mental disease or defect, and a stroke that would affect one's mental condition would be "rather massive", involve a particular part of the brain, and "very likely" leave some permanent damage that would be revealed by tests (Tr. 226, 238, 287-89, 293).

When asked whether the circumstances of the crime charged indicated that some temporary mental disorder, Dr. Owens replied that mental illness does not come and go in a matter of minutes, that "temporary insanity" is not a concept meaningful to psychiatrists, and that there must be some progressive development of a mental illness over a period of years in order for an acute psychotic condition to exist. Thereafter, a substantial period of treatment is required before the patient recovers. (Tr. 212-15.) He had never examined a person obviously suffering from a mental illness where traces of the development of the illness could not be ascertained from the patient's history (Tr. 216-17). Dr. Platkin testified that an acute psychosis would last at least longer than a day, that the person's behavior would be irrational in some respects, that his activity would be disorganized and his speech incoherent. A person in an acute psychotic state would suffer hallucinations, might lose track of time or place and of the identity of persons he sees. His "whole pattern of behavior would be extremely bizarre and it would be quite obvious to anybody around him

that this is abnormal behavior". Nothing presented to Dr. Platkin suggested that appellant suffered from this sort of acute psychosis on November 30, 1963. (Tr. 241-44, 247-49.)

The rebuttal.

Called in rebuttal, Yvonne Thomas, Vaughn Thomas, James Thomas, Mrs. Hazel Clark, Richardo Blocker, and John Sheffield contradicted appellant's version of the events preceding and surrounding the death of Margaret Thomas. Yvonne Thomas denied that there had been any discussion about a movie on Friday, November 29, denied that her mother had told her to become a streetwalker, and denied that appellant had given her $2.00 that night (Tr. 40, 295-96).[12]

Vaughn Thomas and James Thomas, sons of Margaret Thomas, and Mrs. Hazel Clark, her aunt, all contradicted appellant's story that the two boys had been at 1814 Florida Avenue when appellant returned on Saturday night. Specifically, they testified that Vaughn had been at the home of Hazel Clark when he learned from his sister of his mother's death, sometime between 8:30 and 9:00, and that James Thomas had spent that evening working for the Washington Post. Vaughn arrived at Mrs. Clark's sometime between 7:00 and 7:30 p.m., having left his mother's home at 1:30 that afternoon. He did not see appellant at any time that day. James had left home at about 7 p.m. or 7:45 for work and was at the Post Building when he learned of Margaret Thomas' death. When he left 1814 Florida Avenue, appellant was not there. (Tr. 297-306.)

Finally, also contrary to appellant's story, Richardo Blocker and John Sheffield testified that they had been in the Thomas apartment with Mrs. Thomas, Yvonne, and Eric Harris when appellant entered on the night in question. Richardo Blocker testified that the four youngsters

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[12] She had previously testified that in November, 1963 she was earning $20.00 a week babysitting (Tr. 39).

were watching television when appellant arrived, while Mrs. Thomas lay on the bed. (Tr. 307-09, 312-13.)[13] John Sheffield added that upon entering the room, appellant walked to the bed on which his wife lay and fired six times. While fleeing from the room, John Sheffield saw appellant remove something from his pocket and open the gun. (Tr. 314-19.)

Appellant's request that the jury be instructed on the lesser included offense of manslaughter was denied, as the court was of the opinion that such a charge was not justified by the facts (Tr. 325). The case was submitted to the jury on first and second degree murder and on the weapons charge (Tr. 358-68). During the jury's deliberations, at their request, "the testimony of Yvonne Thomas and Eric Harris regarding what transpired from the time of the entrance of the defendant and including the actual shooting" was read to them (Tr. 376-402), and the charge on premeditation and deliberation was reiterated (Tr. 403-05). Shortly thereafter, the jury returned their verdict of guilty as charged (Tr. 405-06).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2401 provides in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely, . . . of deliberate and premeditated malice . . ., is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402 [dealing with obstructions of railroads], kills another, is guilty of murder in the second degree.

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[13] Further details of what occurred that night were excluded by the court (Tr. 310-11).

Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 31(c) of the Federal Rules of Criminal Procedure provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The Government's evidence showed that at some time before the night of Margaret Thomas' death, appellant had ceased living regularly with her, that on that afternoon he had accused her of infidelity, that he came to her apartment armed with a loaded gun and ten additional rounds of ammunition, that he entered the bedroom of that apartment, walked directly to the bed upon which she lay, spoke one sentence, pulled out his gun, and discharged its bullets at her head, and that he began then to reload his weapon. The evidence also disclosed that Margaret Thomas was unarmed and did nothing to provoke appellant into his act. Moments after the shooting,

appellant calmly told a neighbor that he had killed his wife. This evidence surely was sufficient to permit the jury to conclude that appellant had formed his fatal design before he came to his victim's apartment. Thus the question of appellant's guilt of first degree murder was properly submitted to the jury.

II

Appellant does not contend that the court's instructions on the elements of premeditation and deliberation were erroneous—he merely asserts that they should have been lengthier. However, his trial counsel failed to ask the court to expand upon this subject but rather expressed to the court his satisfaction with the charge. Accordingly, appellant cannot obtain reversal for the asserted deficiency in the charge.

III

The Government's testimony was devoid of evidence of provocation or self-defense that would justify a charge on manslaughter. Appellant's story was not that he was provoked or afraid but rather than he did not kill his wife. Accordingly, there was no evidence upon which a verdict of manslaughter could be returned and the trial court properly refused to submit this offense to the jury.

ARGUMENT

I. The trial court properly permitted the jury to consider the question whether appellant was guilty of first degree murder.

(Tr. 29-34, 41, 49-52, 60-61, 64-68, 79-81, 85-87, 93, 97, 109-10, 115-16, 145-48, 180-81, 202-06, 256-57, 259-62, 264-65, 312-19, 376, 403, 405-06)

Appellant stands convicted of having murdered his common law wife, "purposely and with deliberate and premeditated malice",[14] by shooting her with a pistol. He

[14] Indictment, Crim. No. 35-64.

now claims that the jury's verdict is not supported by sufficient evidence that he meditated and pondered upon his act in advance. Viewed in light of the appropriate rules of law, the record is replete with evidence that the murder of Margaret Thomas was coldly calculated, and that the jury's verdict is well justified.

One who kills another "purposely" [15] and with "deliberate and premeditated malice" is guilty of murder in the first degree. 22 D.C. Code § 2401. A purposeful, malicious killing that is not premeditated and deliberated upon constitutes murder in the second degree. 22 D.C. Code § 2403. See *Allen* v. *United States*, 164 U.S. 492, 495 (1896); *Bishop* v. *United States*, 71 App. D.C. 132, 134, 107 F.2d 297, 301 (1939); *Sabens* v. *United States*, 40 App. D.C. 440, 442 (1913). While some "appreciable" period of time must elapse between the formation of the design to kill and the execution of the plan, from which the jury may infer that the plan was pondered upon,[16] it is obvious that the Government need not prove precisely when the determination was formed. All that is necessary is that the circumstances of the crime permit the inference that the defendant decided to kill his victim and then thought about this decision.[17]

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[15] That is, intentionally. *Collazo* v. *United States*, 90 U.S. App. D.C. 241, 246, 196 F.2d 573, 578, *cert. denied*, 343 U.S. 968 (1952); *Patten* v. *United States*, 42 App. D.C. 239 (1914). The intent to kill can be inferred "from the very fact that a fatal bullet was fired . . . ." See *Allen* v. *United States*, *supra* at 496. *Accord*, *Collazo* v. *United States*, *supra*.

For expositions of the element of malice, which differentiates murder from manslaughter, see, *e.g.*, *Allen* v. *United States*, *supra* at 496; *Fryer* v. *United States*, 93 U.S. App. D.C. 34, 38 n. 18, 207 F.2d 134, 138 n. 18, *cert. denied*, 346 U.S. 885 (1953).

[16] *E.g.*, *Bullock* v. *United States*, 74 U.S. App. D.C. 220, 122 F.2d 213 (1941); *Bostic* v. *United States*, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), *cert. denied*, 303 U.S. 635 (1938).

[17] Although at page 30 of his brief appellant states that there must be "evidence of actual premediation and deliberation", surely he does not suggest that the Government must present direct evidence of the operations of the defendant's mind. Intent is always proved by circumstances. In some cases, statements by

In considering whether there is sufficient evidence of premeditation and deliberation to sustain the jury's verdict, of course, this Court must view the record in the light most favorable to the Government, making full allowance for the right of the jury to access the credibility of the witnesses and to draw justifiable inferences of fact from the evidence adduced at trial. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945). It is not necessary that the evidence rule out every reasonable hypothesis but that of guilt. On the contrary, where there are divergent hypotheses, one of guilt and one of innocence, and there is evidence to support each, then the jury must be given the opportunity to choose between them. *Curley* v. *United States*, *supra*. Repeatedly, in homicide cases, this Court has declined to "usurp the function of the jury in deciding guilt or innocence." *Weakley* v. *United States*, 91 U.S. App. D.C. 8, 9, 198 F.2d 948, 949 (1952). *Accord*, *Williams* v. *United States*, 76 U.S. App. D.C. 299, 131 F.2d 21 (1942); *Lanckton* v. *United States*, 18 App. D.C. 348, 368 (1901). Specifically, in *Weakley* v. *United States*, *supra* at 10, 198 F.2d at 950, this Court pointed out that whether the necessary reflection and consideration actually occurred is for the jury, properly instructed, to determine "from the circumstances preceding and surrounding the killing." *Accord*, *Bostic* v. *United States*, 68 App. D.C. 167, 169-70, 94 F.2d 636, 638-39 (1937), *cert. denied*, 303 U.S. (1938).

Precisely what were the circumstances surrounding the shooting of Margaret Thomas on November 30, 1963? For some four years, Margaret Thomas and appellant Belton had lived together[18] (Tr. 29). However, before that night

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the defendant will be available; in others, his actions are the only proof of his intention and are sufficient. *Allen* v. *United States*, *supra* at 496.

[18] Appellant testified that they had a common law marriage (Tr. 145-48).

appellant had ceased to live regularly with Mrs. Thomas and her children [19] (Tr. 30). He returned only "once in a while" to stay (Tr. 30). On the afternoon of the fatal day, appellant called Margaret Thomas at her home. During the course of that telephone conversation, appellant talked about a man who had come to meet Margaret Thomas at the laundry where both she and appellant worked. (Tr. 35, 40-43.)

At about 8:30 that night, appellant burst into the bedroom of the apartment he had shared with Margaret Thomas. Apparently oblivious of the four teenagers who sat watching television, appellant walked directly to the bed upon which his wife lay, said to her, "I thought you didn't drink any more",[20] pulled a revolver from his pocket, and commenced firing (Tr. 31-34, 41, 48-52, 312-13, 314-19). Two of these bullets went completely through the bed; two more penetrated Mrs. Thomas' skull—one of these rendered her instantly unconscious and caused her death (Tr. 85, 109-10, 115-16). Either before appellant began to shoot, or during the firing, Margaret Thomas turned to look at him and asked whether he was crazy (Tr. 32, 49, 52). The young spectators of this brutal act heard six shots fired. As they fled from the room, they saw appellant open the gun, reach into his pocket, and commence to reload his weapon (Tr. 32, 34, 49, 50, 317-18). The deed accomplished, appellant proceeded to the apartment of a neighbor, where he hid in a basket of wash the fully-reloaded revolver and 54 live .22 caliber shells (Tr. 60-61, 79-81, 86-87). In appellant's pocket, shortly after the shooting, the police found one more live .22 caliber shell (Tr. 93, 97). To the neighbor who saw him, moments after the crime, appellant appeared calm

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[19] This testimony by Yvonne Thomas is apparently corroborated by appellant and his sister that when he had the stroke in the fall of 1963 it was his sister who took him to the hospital and at whose house he seems to have stayed while recuperating (Tr. 180-81, 202-06, 256-57, 259-62, 264-65).

[20] So Yvonne Thomas testified (Tr. 32); Eric Harris could not hear what appellant said to his wife (Tr. 49, 51-52).

and collected, neither excited nor nervous as he announced that he had killed his wife (Tr. 64-68).[21]

This evidence is decidedly sufficient to prove that the murder of Margaret Thomas was premeditated and deliberated upon. Appellant and his wife had not been living together immediately before the killing. That very afternoon, he apparently had accused her of seeing another man. While the Government need not prove that a defendant had reason to desire the death of his victim,[22] surely this testimony is evidence that appellant had, or thought he had, some reason to feel ill-will towards his wife. Moreover, appellant came armed to the apartment that night, for he produced the pistol from his pocket within seconds of his entry into the room.[23] And certainly the fact that he came possessed of sixty-six live bullets for the gun indicates that he had planned in advance to use it. This alone is sufficient to prove premeditation and deliberation upon the design to kill. *United States* v. *Wilson*, 178 F. Supp. 881 (D.D.C. 1959).[24] With-

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[21] By appellant's own testimony, he worked all day before the murder (Tr. 154-55).

[22] *Pointer* v. *United States*, 151 U.S. 396, 413-14 (1894); *O'Leary* v. *United States*, 160 F.2d 333 (9th Cir. 1947); *McHenry* v. *United States*, 51 App. D.C. 119, 123, 276 Fed. 761, 765 (1921).

[23] Although the murder weapon had been in appellant's possession in the Belton-Thomas apartment prior to November 30 (Tr. 42), appellant had not been home that day (Tr. 34-35), and he drew the gun from his pocket almost immediately upon entering the apartment (Tr. 31-32, 49, 51-52). It is thus obvious that he had the gun with him when he came.

[24] The *Wilson* case came before the court on a motion to set aside the verdict as against the weight of the evidence. A verdict of first degree murder had been returned where the evidence showed that at 7 o'clock one morning the defendant, armed with a gun, entered the apartment of his estranged lover and, after a brief interchange, shot her to death. The court found this evidence sufficient to submit to the jury the charge of first degree murder. On the motion before it, however, the court was free to weigh the credibility of the witnesses and to grant a new trial (on the indictment) if it believed the verdict contrary to the weight of the evidence. After considering the defendant's testimony that he regularly carried the gun with him in his taxicab,

in seconds of his entry into the room, utterly without provocation, appellant had begun firing the series of six shots, one of which killed Margaret Thomas. His gun empty, he reloaded it from his rich supply of cartridges. Moments later, having disposed of the murder weapon and of his unused bullets, appellant calmly told of his deed. Absent an express statement of intention, it is difficult to posit a more compelling case of deliberate, premeditated murder. See *State* v. *Snowden*, 79 Idaho 266, 313 P.2d 706, 711 (1957); 1 WHARTON, CRIMINAL LAW & PROCEDURE § 267, at 567 (1957); *cf. Frady* v. *United States*, 121 U.S. App. D.C. 78, 348 F.2d 84, 102, *cert. denied*, 382 U.S. 909 (1965), where, the appellants having been convicted of first degree murder for kicking and beating to death their victim, this Court held that the "vicious assault . . . was prolonged sufficiently before the final blows were struck to show a deliberate and premeditated killing."

Courts of Appeals have many times upheld convictions for first degree murder upon records similar to that before the Court in this case. For example, in *Tucker* v. *United States*, 115 U.S. App. D.C. 250, 318 F.2d 221 (1963), *cert. denied*, 381 U.S. 952 (1965), the Court affirmed such a conviction upon proof that several months before the murder the defendant and a lady had broken off their relationship at her urging, that the defendant came up to the lady and her woman friend on a public street and put his hand into his pocket, that he followed as they ran, and that he shot the friend dead and continued after the lady but was captured before he could finish his design. In *Kemp* v. *Government of Canal Zone*, 167 F.2d 938 (5th Cir. 1948), the court affirmed a conviction

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the court determined to grant a new trial. This Court, however, when judging the sufficiency of the evidence, is not free to draw inferences favorable to the defense. In this respect the function of this Court differs from that of the Court of Appeals of the State of New York which can weigh the evidence in a capital case. N.Y. Const. Art. III, § 3; *e.g., People* v. *Caruso*, 246 N.Y. 437, 159 N.E. 390 (1927).

of first degree murder on a record devoid of evidence of motive, where the defendant had reached through a porthole and stabbed his fellow-seaman to death with a three inch knife, while the victim lay asleep in his bed. Finally, in *United States* v. *Wilson, supra,* the District Court held a *prime facie* case of first degree murder established by evidence very similar to that presented here.

The jury in this case was obviously alert to the significant factors distinguishing the crimes of first and second degree murder. After several hours' deliberations, the jury asked to hear again the testimony of what occurred when appellant burst into the bedroom and the charge on the elements of premeditation and deliberation (Tr. 376, 403). Shortly thereafter (Tr. 405-06), their verdict was returned. It should be sustained by this Court.

II. The unobjected to instructions on the elements of premeditation and deliberation were sufficient.

(Tr. 30-35, 40-43, 48-52, 60-61, 64-68, 79-82, 85-90, 92-93, 101-02, 307-09, 312-19, 358-62, 364, 368-69, 374)

Appellant's second complaint concerns the trial court's instructions on the elements of premeditation and deliberation. Apparently conceding that these elements were correctly defined in the charge, appellant now suggests that further amplification would have been appropriate. While this Court may notice "plain errors or defects affecting substantial rights" that were not called to the attention of the trial court, Fed. R. Crim. P. 52(b), it is elementary that the defect asserted must be "substantial" —that it must have prejudiced the appellant's case. Especially where the appellant claims error in the court's charge, the prejudice must be strong in order for this Court to notice the defect. Fed. R. Crim. P. 30 specifically states that

> no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stat-

> ing distinctly the matter to which he objects and the grounds of his objection.

Allis v. *United States*, 155 U.S. 117, 122-23 (1894); *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). The reason for this rule is obvious—the appellant should not be permitted to gamble on the verdict of the jury and, if he loses, to urge error in something that was within his power to correct in the District Court. Even where the conviction is for murder, this Court will refuse to notice minor defects in the charge. *Hansborough* v. *United States*, 113 U.S. App. D.C. 392, 393, 308 F.2d 645, 646 (1962);[25] *cf. Tucker* v. *United States, supra.*

In the instant case, at the conclusion of the charge on the elements of the crimes of murder, defense counsel's only comment was to request that the court inform the jury that the absence of proof of motive was a circumstance they could consider (Tr. 368-69). At the conclusion of the entire charge, experienced retained counsel renewed his request that the court instruct on manslaughter (see Argument III, *infra*), and then said,

> I think Your Honor's charge was very fair and complete. I want to thank you for it. (Tr. 374.)

In these circumstances, reversal for failure to discuss more fully the elements of premeditation and deliberation surely is inappropriate. *Carl S. Kelly* v. *United States*, D.C. Cir. No. 19746, decided March 8, 1966; *cf. Santiago Rivera* v. *United States*, D.C. Cir. No. 19528, decided May 10, 1966.

Nor did the trial court in this case fail to enlighten the jury on what constitutes premeditation and deliberation sufficient to support a verdict of first degree murder. After discussing the elements of purpose to kill and malice

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[25] "In a record devoid of appealable points and with evidence guilt overwhelming, Hansborough is relegated now to attacking the court's charge for the first time. . . ."

aforethought (Tr. 358-61),[26] Judge Keech turned to the fourth element of the crime of murder in the first degree,

> namely that the defendant acted with premeditation and deliberation.
>
> Premeditation is the formation of the intent or plan to kill, the formation of a positive design to kill.
>
> Deliberation means further thought upon this plan or design to kill.
>
> It must have been considered by him, the defendant.
>
> It is your duty to determine from the facts and circumstances in this case, as you find them, surrounding this killing, whether reflection and consideration amounting to deliberation occurred.
>
> If so, even though it was of exceedingly brief duration, that is sufficient because it is the fact of deliberation rather than the length of time it continued, that is important; although some appreciable period of time must have elapsed during which the defendant deliberated in order for this element to be established but no particular length of time is necessary for deliberation, and it does not require the lapse of days or hours or even minutes. (Tr. 361-62.)

Later, distinguishing for the jurors the difference between the two degrees of murder, the court pointed out that they might convict appellant of second degree murder

> if you find that the government has failed to prove the purpose and the intent to kill or has failed to prove premeditation and deliberation. . . (Tr. 364).

The above-quoted charge fully complied with the requirements of *Bostic* v. *United States*, *supra*, and *Bullock* v. *United States*, *supra*. It informed the jury that premeditation means the formation of the plan to kill. It informed the jury that deliberation means further thought about this plan, further consideration of the design to kill. It informed the jury that no special length of time

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[26] The instructions on these elements are not challenged in any respect.

need pass during this deliberation, but that some "appreciable" time must indeed elapse. Appellant argues that the phrase "appreciable time" is the significant portion of a charge on deliberation, and he is dissatisfied because this phrase appears in "a subordinate clause" of the charge (Br. 39). However, the necessary time is not to be measured by any particular chronometer. While one or two seconds is obviously too short a time to permit any serious thought upon a matter [27] it is entirely possible that in fifty seconds or ninety, one might be able to decide to kill, reflect upon it, and execute one's plan. As this Court emphasized in *Bostic*, "it is not the lapse of time itself which constitutes deliberation, but the reflection and consideration, which takes place in the mind of the accused. . . . Lapse of time is important because of the opportunity which it affords for deliberation. . . . The jury must determine from the circumstances preceding and surrounding the killing whether reflection and consideration amounting to deliberation actually occurred. . . ." *Bostic* v. *United States*, *supra* at 169-70, 94 F.2d at 638-39. So the judge charged the jury in this case (Tr. 361-62).

Moreover, from the circumstances of the crime—that appellant and the deceased had interrupted their regular relationship, that they had argued constantly, that appellant had berated the deceased a few hours before the crime for her apparent infidelity, that he burst into her room armed with a loaded gun and 10 rounds of ammunition, that, utterly without provocation, he drew out the pistol and commenced firing, that, his bullets expended, he reloaded his weapon, and that moments thereafter he told of Margaret Thomas' death calmly and without visible signs of emotion [28]—the jury could easily conclude

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[27] For example, in *Bullock* v. *United States*, *supra*, the defendant, while engaged in a drunken quarrel, gun in hand, whirled around and, within one or two seconds, shot dead a policeman who came up and spoke to him.

[28] Tr. 30-35, 40-43, 48-52, 60-61, 64-68, 79-82, 85-90, 92-93, 101-02, 307-09, 312-19.

that appellant had formed his fatal design long before he entered the murder room. "In view of the instructions in their entirety, the absence of objection or request for anything additional, and in view also of the evidence and sentence . . ." the absence of additional explanation of the terms "premeditation and deliberation" does not constitute prejudicial error. *Tucker* v. *United States*, *supra* at 252, 318 F.2d at 223.

Appellant also suggests (Br. 43-45) that the trial judge erred in failing to summarize for the jury the contentions of the Government and the defense. But the court is not obliged to review the evidence in its charge, particularly in the absence of a specific request that it do so. *Stilson* v. *United States*, 250 U.S. 583, 588 (1919); *Starr* v. *United States*, 153 U.S. 614, 624-26 (1894); *United States* v. *Kahaner*, 317 F.2d 459, 479 n.12 (2d Cir.), *cert. denied*, 275 U.S. 835 (1963); *Arwood* v. *United States*, 134 F.2d 1007, 1011 (6th Cir.), *cert. denied*, 319 U.S. 776 (1943); see *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Indeed, a judge who undertakes to summarize the testimony runs the risk of a complaint that his discussion is incomplete and partial. See *Allis* v. *United States*, *supra* at 124; *United States* v. *Kahaner*, *supra* at 476, 479-80. It is for counsel as advocates for their respective sides to suggest to the jury the inferences to be drawn from the evidence and to argue that the inferences favor their position rather than that of the opponent. Judge Keech did not comment upon the evidence in this case and he was neither requested nor required to do so. He promptly adopted defense counsel's suggestion that the jury be charged that the absence of proof of a motive for the murder was a factor to be considered by them in determining the question of appellant's guilt or innocence (Tr. 368-69). Had counsel perceived a deficiency in the charge on the elements of the crime of murder and brought the asserted deficiency to the court's attention, it undoubtedly would have been remedied. The charge was adequate and does not provide a ground for reversal.

III. The trial court properly declined to submit to the jury the question whether appellant was guilty of manslaughter, for there was no evidence to support that charge.

(Tr. 31-34, 41-42, 49-52, 116, 156-57, 160-64, 177-79, 182-83, 185-86, 190-91, 194, 197-98, 316-18, 325, 360-61, 363-65)

Appellant's final contention is that the trial court erred in denying his request to charge the jury on the lesser offense of manslaughter. This Judge Keech declined to do because, he said, "as I view the entire record in this case, I do not think the facts would justify that charge." (Tr. 325).[29]

A defendant is, of course, entitled to have submitted to the jury any offense necessarily included in the crime charged by the indictment, Fed. R. Crim. P. 31(c), provided, however, that there is some evidence to support guilt of the lesser crime. "The evidence as to [the lesser offense] need not be uncontradicted or in any way conclusive upon the question; so long as there is *some evidence* upon the subject, the proper weight to be given it is for the jury to determine." *Stevenson* v. *United States*, 162 U.S. 313, 314 (1896) (Emphasis added.). *Accord*, *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951). Where, however, there is "a complete absence of evidence upon the issue", a charge on a lesser offense should not be given. *Kinard* v. *United States*, 68 App. D.C. 250, 253, 96 F.2d 522, 525 (1938). *Accord*, *Sparf* v. *United States*, 156 U.S. 51, 63-64, 99-100 (1895). The record in this case is devoid of evidence to support a conviction for manslaughter and accordingly the issue was properly withheld from the jury.

Manslaughter is "the wilful and unlawful killing of another on sudden quarrel or in the heat of passion," following "some provocation" by the victim "to produce a certain condition of mind." Epithets alone, however, can

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[29] The court did instruct on the included offense of second degree murder (Tr. 325, 363-65).

not constitute provocation sufficient to reduce a homicide to manslaughter, for "mere words alone do not excuse even a simple assault." The victim "must be doing some act . . . which at the time is of character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion; in a heat of passion where he is incapable of deliberation." *Allen* v. *United States*, *supra* at 496-97.[30] Excessive force used in one's own defense may also result in a verdict of manslaughter. *Ibid; Inge* v. *United States*, —— U.S. App. D.C. ——, 356 F.2d 345 (1966).

As appellant apparently concedes, nothing in the Government's evidence would support a verdict of manslaughter. *Cf. Womack* v. *United States*, 119 U.S. App. D.C. 40, 336 F.2d 959 (1964). The testimony of Yvonne Thomas, Eric Harris, and John Sheffield was that appellant entered the apartment, walked to the bed upon which Margaret Thomas lay, spoke to her briefly, and commenced firing (Tr. 31-34, 41, 48-51, 316-18). His victim had nothing in her hands (Tr. 33, 42), thus negating any claim of self-defense, and if she spoke to appellant before the shooting (*compare* Tr. 32 *with* Tr. 49, 52), her words could not suffice to reduce appellant's crime to manslaughter. *Allen* v. *United States*, *supra*.

Appellant thus relies solely on his own testimony in suggesting that his evidence "raised the possible inferences that he killed his wife either in the heat of passion provoked by her or while struggling to defend himself against an assault commenced by her" (Br. 47). He points to his statements that Margaret Thomas "struck him first" (Tr. 160, 175, 190-91), and that "she had a weapon during the altercation which led to the killing" (Tr. 156-57, 162, 177) (Br. 45, 47-48). However, this testimony cannot be considered alone, and the whole

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[30] *Accord, Fryer* v. *United States*, *supra; Bishop* v. *United States*, 71 App. D.C. 132, 136-37, 107 F.2d 297, 302-03 (1940); *Kinard* v. *United States*, *supra* at 254, 96 F.2d at 526.

thrust of the story that appellant told the jury was that he did not kill Margaret Thomas. He testified that they "tussled" after she slapped him and drew a gun (Tr. 160-63, 177-78, 181-83), and that the gun "went off a couple of times" during the struggle for its custody (Tr. 162, 183-84). But he stated over and over that he never had possession of the gun that night (Tr. 156-57, 179, 182, 185-86, 194),[21] or, indeed, at any time (Tr. 157, 169, 185, 197, 198). Most importantly appellant repeatedly testified that when he left the apartment after the "tussle", Margaret Thomas was alive, uninjured and able to call a threat after him (Tr. 163, 164, 167, 185-86).[22] Taken with the testimony of the coroner that the fatal bullet would have rendered her unconscious (Tr. 116), it is apparent that if appellant's story was true, he played no role in the death of Margaret Thomas. His testimony, therefore, provided no foundation for a charge on the offense of manslaughter.[23]

Kinard v. *United States*, *supra*, upon which appellant strongly relies, and *Stevenson* v. *United States*, *supra*, are inapposite, for there, where both parties to the alterca-

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[21] *E.g.*, Tr. 179: "I never had the gun to pull the trigger"; Tr. 182: "Well, tussling, I trying to get hold of the gun but I never could get it"; Tr. 185: "Q So you weren't touching the gun at the time it went off, both times; is that right? A No, I didn't have it, I never did get it."

Appellant also claimed that because of the stroke he had suffered, he was physically incapable of pulling the trigger with only one hand (Tr. 178-79).

[22] *E.g.*, Tr. 163: "So I ran out . . . and she yelled to me, said 'Ain't no need of running because I'll get you when you come back;'" Tr. 164: "Q Now, at that time had she been shot or hurt? A No, sir; no, sir."

[23] Even if the jury could reasonably reject appellant's testimony that his wife was alive and uninjured when he left, there would remain his repeated claim that he had never had the gun in his hand. Had Mrs. Thomas been shot during the struggle for possession of the gun, her death would have been an accident, and appellant innocent of any crime. *E.g.*, *Bell* v. *United States*, 60 App. D.C. 76, 78, 47 F.2d 438, 440 (1931); see *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), *cert. denied*, 341 U.S. 905 (1951).

tions had weapons, the defendants claimed self-defense or, possibly, that they killed in the heat of passion. In the instant case, however, there was only one weapon and no claim of self-defense.

> If the evidence precludes the legal possibility of guilt of a lesser offense, then it would be error to submit the case to the jury on such offense. . . . Due process commands that an accused be tried, and the jury instructed, on the facts as disclosed in the record.

Hansborough v. *United States*, *supra* at 395, 308 F.2d at 648.

> The lesser-included-offense charge is not required simply because the jury could exercise its power of acquitting on the greater charge for no reason at all 'in the teeth of both law and facts,' Horning v. District of Columbia, 254 U.S. 135, 138 . . . (1920); there must be a rational basis for its doing so. Precisely this, we think, is the distinction between Sparf v. United States, [*supra*,] . . . and Stevenson v. United States, supra . . . .

United States v. *Markis*, 352 F.2d 860, 867 (2d Cir. 1965). The Government's evidence at this trial proved murder;[34]

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[34] Appellant argues that the trial court declined to charge on manslaughter because it erroneously conceived that malice must be implied from the use of a dangerous weapon. Apart from the fact that the court expressly stated that the charge was refused because not warranted on the evidence (Tr. 325), the instruction on malice does not reveal the suggested misconception. Judge Keech charged the jury that:

> Implied malice, is such as may be inferred from the circumstances of the killing, as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act or when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.
>
> The instrument of means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and is what degree it may be so.
>
> If in a prosecution for a homicide, it is shown that the accused, the defendant, used a deadly weapon in the commis-

appellant's proved innocence. The jury could not rationally have combined the testimony of the witnesses to concoct a case of manslaughter. In these circumstances, a charge on manslaughter was rightly refused. *E.g.*, *Sparf* v. *United States*, *supra*; *Bell* v. *United States*, *supra*; *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951); *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 188 F.2d 397, *cert. denied*, 339 U.S. 987 (1950); *United States* v. *Strassman*, 241 F.2d 784, 787 (2d Cir. 1957).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
CAROL GARFIEL,
Assistant United States Attorneys.

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sion of the homicide, the law infers from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide, and you are instructed as a matter of law that a gun or a pistol is a deadly weapon. (Tr. 360-61.)

This instruction is in complete accord with that recommended by the Junior Bar Section in its MANUAL OF CRIMINAL JURY INSTRUCTIONS, § 83, at 62-63 (1966). Appellant did not testify that he was provoked into shooting Margaret Thomas, or that he shot in fear—he testified that he did not shoot her. There was thus no evidence in the record of explanatory or mitigating circumstances that would reduce the crime to manslaughter, and the court properly instructed the jury that if they found that appellant had killed his wife, they must convict of murder in some degree. *Sparf* v. *United States*, *supra* at 60, 63-64, 99-100.

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PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,247

PAUL BELTON, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court

for the District of Columbia

Julius M. Greisman
Daniel A. Rezneck
1229-19th St., N.W.
Washington, D.C.

Attorneys for Appellant
(Appointed by this Court)

Appellant respectfully requests this Court to grant rehearing en banc of his appeal from a conviction for murder in the first degree. He was sentenced to life imprisonment after conviction of the murder of his common-law wife which took place during a domestic fracas in their home. His conviction was affirmed by a panel of this Court on June 16, 1967, by a vote of two to one.

By order of June 29, 1967, this Court extended appellant's time to file this petition for rehearing to and including July 17, 1967.

The panel decision affirmed appellant's conviction despite the following acknowledgments of error below:

(1) With respect to the essential elements of premeditation and deliberation, the trial court's instructions were "skimpy" and "We do not say that the phrase used by the trial court could survive objection." (Slip Opinion, pp. 5-6.)

(2) With respect to the essential element of malice, "The judge erred in stating that 'the law infers . . . malice' from the use of a deadly weapon, and would have been obligated upon request to substitute instead an instruction charging that the law permits the jury to draw this inference of malice." (Id., p. 8.)

(3) With respect to the refusal of appellant's request for a manslaughter instruction, "If the trial court had been specifically apprised of the reconstruction of events now put forward to us by appellate counsel, it would have been well advised to give the manslaughter instruction." (Id., p. 12.)

With respect to the sufficiency of the evidence to support the first degree murder conviction, the panel also acknowledged that some of the evidence of a prior quarrel between appellant and the decedent, from which the crucial elements of premeditation and deliberation might be inferred, was "ambiguous and some was based on hearsay testimony. . . ." (Id., p. 3.)

Despite these serious errors, the majority of the panel affirmed the conviction apparently because they were "left overall with the conviction that essentially this was a case of clear and open conflict between the testimony of defendant and of the several prosecution witnesses, that the jury . . . believed their account of the events." (Id., p. 13.)

With all due respect to the majority of the panel, we submit that the errors conceded to exist here are so basic that the full Court should review the panel's decision. The

majority's affirmance runs squarely against the holding of the United States Supreme Court that:

> "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." Bollenbach v. United States, 326 U.S. 607, 614 (1946).

The majority's decision:

> "really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." (326 U.S. at 613-14)

We will review briefly the errors found by the panel to show that its affirmance of the conviction in the face of them runs contrary to a settled course of decisions by this Court.

I.

In the present case, the trial court instructed the jury that the deliberation required for first degree murder "does not require the lapse of days or hours or even minutes."

In Austin v. United States, No. 19,903, decided the same day, another panel of this Court held objectionable an instruction that the time to deliberate "may be in the nature of hours, minutes or seconds." (Slip Opinion, p. 5) This panel further stated in Austin:

> "As Bostic and Bullock, Fisher and Frady, all make clear, no particular length of time is necessary for deliberation, and the time required need not be longer than a span of minutes. But none of our post-Bostic opinions sanctions the reference to 'or seconds' injected by the trial judge. The obvious problem with such a reference is that it tends to blur, rather than clarify, the critical difference between impulsive and deliverate killings." (Id., p. 12)

Nevertheless, the majority in the present case insisted that the charge here is "certainly different in impact from the 'seconds' charge considered in Austin, and does not of itself constitute reversible error in the absence of objection." (Slip Opinion, p. 5, n. 5)

We are frank to admit that we do not understand the difference between the charge disapproved in the Austin case

and the charge in the instant case. That the jury was also confused on the critical issue of deliberation is indicated by their request to be reinstructed on this very point after they had retired. That they must have remained confused is indicated by the fact that the same instruction was merely repeated verbatim by the trial court. The prejudice to appellant is clear. Deliberation was central to the case -- whether the killing was in cold blood or on impulse as the outgrowth of a domestic fracas. If this basic charge on the crime of which appellant was convicted is not clear, and admittedly might not withstand timely objection, we believe that a conviction based thereon must be reversed.

II.

The panel unanimously accepted appellant's contention that the trial court committed error in giving the following instruction:

> "If in a prosecution for a homicide, it is shown that the accused, the defendant, used a deadly weapon in the commission of the homicide, the law infers from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice essential to culpable homicide, and you are instructed as a matter of law that a gun or a pistol is a deadly weapon." (Tr. 360-61). (Slip Opinion, p. 7).

The panel further held that this instruction was erroneous in two respects: (a) It was an incorrect statement of law, because the law does not infer malice from the use of a deadly weapon, it merely permits the jury to draw the inference of malice from the use of a deadly weapon. (b) The instruction amounted to a direction to the jury to find malice if it found that appellant killed his wife with a gun. It thus was a peremptory instruction on an essential element of the offense and violated the established principle, accepted by the majority, that "The court may not withdraw from the jury's consideration any of the essential elements of the crime." (Slip Opinion, p. 8., n. 9)

Nevertheless, the panel held that this error did not constitute "plain error" working "such substantial prejudice as to require reversal of the conviction even though no objection was made." (Slip Opinion, p. 8) The panel apparently based its conclusion on (a) the unlikelihood in the context of the whole charge that the jury felt obligated by virtue of the simple phrase "[The law infers]" to find malice if it found defendant had a deadly weapon; (b) this charge did not "ring an alarm of error or prejudice to counsel," and (c) "Last but not least is the consideration that the charge

clearly alerted the jury to the need for premeditation and deliberation, over and above malice, before bringing in a first-degree verdict." (Slip Opinion, pp. 8, 9)

Again, we respectfully submit that a first-degree murder verdict cannot stand if based on an erroneous and peremptory instruction on the essential element of malice. The majority's conclusion is inexplicable to us in view of the panel's explicit recognition and citation of the very authorities in this Court and the Supreme Court which make it absolutely clear that (a) a federal trial court has a duty to instruct the jury correctly on every essential element of a criminal offense--whether or not requested to do so, and (b) a federal trial court is without power to direct a verdict on any issue in a criminal case--whether or not objection is made.

This Court stated in Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772, 773 (1965):

> "The defendant's right to have the jury pass on each element of the offense imposes a duty on the Judge to give proper instructions on each element, even though no request is made by defense counsel."

This principle has been enunciated so many times by this Court that until the panel decision in this case, it had been thought to be beyond dispute. As this Court said, in reversing a first degree murder conviction for erroneous instructions on the essential elements of the offense, in Weakley v. United States, 91 U.S. App. D.C. 8, 12, 198 F.2d 940, 944 (1952):

> "The defect in the instructions which is the turning point of our decision was not called to the attention of the trial court at any stage of the proceedings. But it is the well settled duty of an appelate court to correct such prejudicial error, particularly in a capital case, even though not pointed out in the trial court."

See also Byrd v. United States, 119 U.S. App. D.C. 360, 362-363, 342 F.2d 939, 941-942 (1965); Kinard v. United States, 68 App. D.C. 250, 254, 96 F.2d 522, 526 (1938).

The factors relied on by the majority do not support its conclusion that the error was harmless and may be disregarded. The panel's speculation that it is unlikely that the jury followed the erroneous instruction flies directly in the

face of the teaching of Bollenbach v. United States, supra, which also involved an instruction that a fact raised a presumption instead of merely permitting an inference. Justice Frankfurter rejected the Government's contention that the jury might not have been misled in the context of the whole charge, stating:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." 326 U.S. at 613.

As the authorities in this Court we have cited clearly show, the failure of counsel to object to an erroneous instruction on an essential element is not relevant.

Finally, the error in the instruction on malice cannot be dispelled by pointing to the jury findings of premeditation and deliberation. As we have shown in Point I, the charge on deliberation was also erroneous.

III.

Likewise, the majority's holding that a manslaughter instruction was properly refused is also erroneous.

The majority accepted appellant's contention that an accused is entitled to a manslaughter instruction if there

is "'any evidence fairly tending to bear upon the issue of manslaughter,' however weak. . . .." It agreed that evidence bearing on manslaughter may depend on an inference of a state of facts "that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute." It further conceded that there was testimony by appellant which would have justified the inference that, if he committed the homicide, it was during a struggle for possession of the gun following an altercation provoked by his wife. The majority further stated that had his trial counsel specifically pointed to the evidence justifying the manslaughter instruction, the trial court "would have been well advised" to give the instruction because "the principle that the jury should be permitted to find the facts is a cornerstone of our jurisprudence . . . ." (Slip Opinion, pp. 10-12).

Nevertheless, the majority upheld the refusal of the instruction, apparently because trial counsel failed to spell out the details of the evidence justifying his request. The majority also relied on the fact that the jury returned a first degree murder verdict as "weaken[ing] any sense of

prejudice from failure to charge manslaughter." (Slip Opinion, p. 13).

It certainly would be preferable for the trial counsel to have apprised the trial court of the basis for a manslaughter charge. Nevertheless, the defendant should have the benefit of such a charge -- which was requested -- if as the majority of the panel concedes, the trial court would have been well advised to give such a charge upon appropriate reference to the evidence by the trial counsel. Surely the trial court's obligation to instruct fully on the applicable law is not relieved by a defense counsel's failure to phrase his request with the felicity demanded by the majority of the panel in this case.

The majority's reliance on the jury's verdict of first degree murder as evidencing lack of prejudice from failure to charge on manslaughter is misplaced. First, as we have shown above, there was error in the instructions on premeditation and deliberation and malice -- all elements essential to the first degree murder conviction. But, even if these instructions were correct, the majority opinion is contrary to the teaching of this Court in Kinard v. United States, 68 U.S.

App. D. C. 250, 96 F.2d 522 (1938). The facts of Kinard are the same as those of the present case in all relevant respects. Kinard was convicted of first degree murder. This Court reversed his conviction because the trial court refused to allow the jury to consider the lesser offense of manslaughter. The fact that the defendant was convicted of first degree murder was irrelevant to the question of prejudice resulting from the refusal to let the jury consider manslaughter.

Prejudice inevitably results to a defendant from the erroneous denial of a manslaughter instruction. In the present case, by refusing to instruct on manslaughter, the trial court was, in effect, telling the jury that the crime was murder or nothing. Had the court allowed the jury to consider manslaughter, the jury would have had the full range of alternatives within homicide to consider: first degree murder; second degree murder; and manslaughter. The jury might have returned a manslaughter verdict, or if a division among them existed between first degree murder and manslaughter, they might well have returned a verdict of second degree murder, an entirely legitimate exercise of jury power. Refusal of the manslaughter instruction changed the whole nature of the issues confided to

the jury, may well have influenced their deliberations, and cannot be termed harmless.

IV.

The panel in Austin held a first degree murder conviction unsupported by the evidence on stronger facts than those of the present case. There the victim was stabbed twenty-six times and the body was subjected to elaborate mutilation. Here the killing occurred in a matter of seconds through the rapid firing of a pistol. Indeed the Government in another case has contrasted "the irretrievable suddenness of a triggered gun" with actions such as poisoning and garroting which bespeak deliberation. (Brief for the United States in Parman v. United States, No. 20,506, p. 58)

Moreover, in Austin the record was devoid of evidence as to what happened immediately before the killing which might refute the inference of deliberation. Here, by contrast, the Government's own evidence showed that the killing took place only after an exchange of angry words by the appellant and his wife. The Government's own evidence negated deliberation and pointed to an impulsive killing in this case.

CONCLUSION

The errors in the majority opinion of the panel may be summed up in the words of the dissenting Chief Judge:

> "This is a first degree murder case in which the defendant received a life sentence and in which, according to the majority opinion, (1) the evidence on premeditation and deliberation was weak, (2) the charge on deliberation and premeditation was 'brief' and 'skimpy', (3) the charge on malice, relevant to first and second degree murder, was error, and (4) the trial judge would have been "well-advised' to give the manslaughter instruction if trial counsel had reconstructed the facts as well as counsel on appeal." (Slip Opinion, p. 12)

Since the defendant has been convicted of first degree murder and faces spending the rest of his life in prison, the prejudicial nature of these errors should not be disregarded because of the trial lawyer's apparent oversights.

For the foregoing reasons the petition for a rehearing en banc should be granted.

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Attorneys for Appellant
(Appointed by this Court)

CERTIFICATE

I hereby certify that this Petition for Rehearing En Banc is presented in good faith and not for delay.

DANIEL A. REZNECK

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of July, 1967, sent a copy of the foregoing Petition for Rehearing En Banc to be served on the United States by mailing a copy thereof, postage prepaid, to Frank Q. Nebeker, Esquire, Assistant United States Attorney, United States Court House, Washington, D. C.

DANIEL A. REZNECK

Counsel for Appellant
(Appointed by this Court)